Revised 14-661 12

Judge Davis

Judge Miller Swayne

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~443.~~ 227

JOHN T. DELMAS, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' MUTUAL INSURANCE COMPANY, JOHN HENDERSON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED DECEMBER 23, 1870.

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Ch 3 - Title VIII
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1 State of Louisiana, fifth district court of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Petition.—Filed August 9th, 1867.

To the Honorable Charles Leaumont, judge of the fifth district court of New Orleans:

The petition of John Henderson, who resides in the city of New Orleans, respectfully represents:

That at a sale made by the sheriff of the parish of Orleans, on the first day of July, A. D. 1867, at the suit of Mr. and Mrs. Bressole Gibert vs. Joseph Menard, No. 17746 of the docket of this honorable court, your petitioner became the purchaser of the following-described property, to wit:

2 "A lot of ground with the improvements thereon, situated in the first district of this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having, in American measure, twenty-one feet and one-half inch front on Tchoupitoulas street, twenty-eight feet six inches front on said Foucher street, by one hundred and thirty-seven feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-seven feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant, late surveyor, and deposited under the No. 84, in the office of F. Grima, late notary public in this city."

That said purchase was made for the total sum and price of five thousand six hundred and twenty-five dollars, ($5,625 00,) which was settled for by your petitioner, in the following manner, viz: In cash

3 to the sheriff, 1st. The amount of the claim of plaintiff in execution, with interest and cost of copy of act, say seventeen hundred and sixty-six $\frac{66}{100}$ dollars, ($1,766 66;) 2d. The amount of costs and charges, State and city taxes, draining privilege, &c., say the sum of three hundred and fifty-nine $\frac{27}{100}$ dollars, ($359 27;) and, 3d. Your petitioner retained in his hands (to be applied to the payment of the subsequent mortgages set forth in the mortgage certificate read and recited at the sale) the balance of the price of adjudication, say three thousand four hundred and ninety-nine $\frac{07}{100}$ dollars, ($3,499 07)=$5,625 00.

That the said subsequent mortgages as recited in the deed which your petitioner received according to law from the said sheriff (which deed is hereto annexed, and prayed to be considered and taken as a part of this petition) are the following, to wit, (omitting the draining privilege and such mortgages as have been cancelled by the sheriff according to law:)

4 The one granted by Joseph Menard in favor of the Merchants' Insurance Company per act before Th. Guyol, notary public, dated May 28th, 1857, to secure $10,000, interest and costs, as per said act recorded 29th May, 1857, and reinscribed on the 25th June, 1867.

The general one in favor of Robert H. Bailey, resulting from a judgment rendered by the 3rd district court of New Orleans on the 24th November, 1865, for the sum of $2,500 with interest, &c., and costs, against J. A. McHatton, recorded 18th December, 1865.

The general one in favor of John T. Delmas, resulting from a judg-

ment rendered by the 2nd district court of New Orleans on the 8th of February, 1861, for the sum of $4,560 50, with interest and costs, &c., against J. Menard & al., recorded 24th March, 1866.

The general one in favor of Charles H. Kernion, resulting from a judgment rendered by the 4th district court of New Orleans on
5 the 11th of April, 1866, for the sum of $3,750, with interest, costs, &c., against Menard & Vignaud, recorded May 11th, 1866.

The general one in favor of Edward Dupasseur, resulting from a judgment rendered by the same court on the 16th of March, 1866, for the sum of $9,800, with interest and costs against the same, recorded May 18th, 1866.

And the general one in favor of Pierre Poutz, resulting from a judgment rendered by the same court on the 27th November, 1866, for the sum of $2,000, with interest, costs, &c., against B. Jourdan, & Menard & Vignaud, recorded December 11th, 1866.

That, as will appear by reference to the said sheriff's deed, (hereto annexed as aforesaid,) and to the proceedings in said suit No. 17746 of the docket of this honorable court, the sale at which your petitioner was the highest and last bidder for, and became the purchaser of, the the above-described property, was made under a writ of seizure and sale, and at the suit of a creditor having the first mortgage and
6 vendor's privilege, preferable and anterior to the other above-recited mortgages.

That your petitioner is, and has ever been, willing and ready to pay to whomsoever is entitled to receive the same, the aforesaid balance of thirty-four hundred and ninety-nine dollars and seven cents ($3,499 07) retained in his hands as aforesaid, but that he could not and would not undertake to dicide upon the conflicting claims and relative rank of the mortgage creditors subsequent to the seizing creditor.

And now your petitioner avers that, notwithstanding the above facts, the Merchants' Mutual Insurance Company of New Orleans, by their president, John Pemberton, have applied to this honorable court for, and have obtained, in a certain suit entitled "Merchants' Mutual Insurance Company vs. John Henderson and Joseph Menard," No. 18212 of the docket of said court, an order for the seizure and sale of the above-described property, against your petitioner as alleged third possessor of said property, to pay and satisfy an alleged claim of
7 five thousand dollars, with interest, at 8 % per annum, from the 1st of December, 1866, until paid, and 5 % attorney's fees, alleged to be secured by mortgage by act passed before Theo. Guyol, notary public, in this city, under date of the 19th of May, 1857.

That even if your petitioner, upon the demand made of him by the sheriff to pay the aforesaid alleged claim of five thousand dollars, interest and costs, &c., were to pay the same, he could not do so safely, because an attachment has been lodged in his hands, (on the same day of the service of the demand by the sheriff aforesaid,) seizing the aforesaid balance of $3,499 07 at the suit of John T. Delmas vs. Menard & Vignaud No. 20441, of the docket of the second district court of New Orleans, the said John T. Delmas being one of those creditors whose claim appears to be secured by judicial mortgage as above recited.

Further aver'ing, your petitioner alleges that he is entitled to an injunction to suspend further proceedings on the order of seizure and sale issued in the aforesaid suit of the Merchants' Mutual Insur-
8 ance Company vs. John Henderson and Joseph Menard, and especially to arrest the sale of the above-described property, for the following reasons to wit:

1st. That the note, upon which the said alleged claim of five thousand dollars purports to be based, is prescribed and was prescribed at the time of the issuing of the aforesaid order of seizure and sale, more than five years having elapsed since the maturity thereof, and the same having never been legally renewed, revived, or extended, as apparent upon the face thereof.

2d. That the mortgage which is alleged to secure the payment of the said note, is and was at the time of the issuing of the said order of seizure and sale also prescribed, and had lost its rank, because having been first inscribed on the 29th of May, 1857, it does not purport to have been, nor has it been, reinscribed until the 25th of June, 1867, after more than ten years; and that, in the mean while, other mortgages had been inscribed, which, if valid, would take precedence of it.

9 3d. That having once been sold under the first anterior and preferable mortgage and privilege, the above-described property cannot again be sold to satisfy more than the balance of the price remaining in the hands of the purchaser, at said first sale, after deduction of all costs and charges.

4th. That said order of seizure and sale was illegally and improperly issued upon insufficient, illegal, and unauthentic evidence, inasmuch as—

The note being prescribed upon its face, no authentic evidence was adduced of its having been renewed or extended or acknowledged.

That even if renewed the said note is not stamped as required by the laws of the United States, and cannot therefore be considered or offered in evidence in an ordinary action, and much less be made the basis of an hypothecary action.

That no authentic proof was adduced, nor even an allegation substantially made, that the mortgage purporting to secure said note had been reinscribed in due time, nor could it be reinscribed or of-

10 fered, or considered in evidence unless duly and properly stamped according to the laws of the United States.

That the affidavit of the plaintiff in proceeding against your petitioner as a third possessor is insufficient and illegal, inasmuch as neither it nor the petitioner do anywhere substantially (nor even by implication) declare that the debt, on which the seizure is demanded, is really due to the plaintiff.

That upon the face of the plaintiff's petition, it is self-evident that said plaintiff was not entitled to bring this action against your petitioner, because it is nowhere declared that ten days have elapsed after the thirty days' amicable demand from the principal debtor, Joseph Menard, as required by article 69 of the Code of Practice of Louisiana.

Wherefore the premises and the subjoined affidavit considered, your petitioner prays that an injunction issue from this honorable court, directed to the said Merchants' Mutual Insurance Company of New Orleans, through their president, John Pemberton, and to the sheriff of the parish of Orleans, suspending and forever staying all further proceedings under the aforesaid order of seizure and sale, and especi-

11 ally the sale of the above-described property; that said last-mentioned order be revoked, rescinded, and annulled at the costs of the plaintiff therein, and to the end that justice and equity may be done to all parties in interest, your petitioner further prays that all parties who have or may have any claim to the aforesaid balance of thirty-four hundred and ninety-four $\frac{97}{100}$ dollars in the hands of your petitioner namely, Robert H. Baily, John T. Delmas, Charles H. Ker-

nion, Edward Dupasseur, Pierre Poutz, Joseph Menard, together with the said Merchants' Mutual Insurance Company, be cited to appear and discuss their respective rights to the said balance; that, after due proceedings and upon payment of said balance to whomsoever shall be adjudged entitled to receive the same, after deduction of all costs and charges, your petitioner be forever quieted in the possession of the said above-described property, and that the mortgages recited in said sheriff's deed, as subsequent to the mortgage and privilege under which the said property was seized and sold, be released so far as
12 *the* affect the said property, and that all costs, except those of the said order of seizure and sale herein prayed to be enjoined, be paid out of the said balance.

And petitioner further prays for all general and equitable relief as in duty bound.

(Signed) P. CHA'S CUVELLIER.
Att'y for Pl'ff.

Affidavit.

John Henderson, being duly sworn according to law, declares and says that all the facts and allegations stated in the foregoing petition are true, so help him God.

(Signed) JOHN HENDERSON.

Sworn to and subscribed before me this 9th day of August, A. D. 1867.

(Signed) M. D. BERNOUDY,
D'y Clerk.

Order.

Let a writ of injunction issued in this case, as within prayed for, and according to law, upon plaintiff furnishing bond with good and solvent security in the sum of two thousand five hundred dollars conditioned as the law directs.

New Orleans, August 9th, 1867.

(Signed) G. DUPLANTIER,
13 *Judge of the 6th District Court of New Orleans,*
acting in the absence of Judge Leaumont.

Service accepted.

Service accepted for John T. Delmas.
New Orleans, 9th August, 1867.

(Signed) COLLENS & WOOLDRIDGE,
Att'ys.

Bond.—Filed August 9th, 1867.

Know all men by these presents that we, John Henderson, as principal, and John Henderson, jr., as security, of the city of New Orleans and State of Louisiana, are held and firmly bound unto the Merchants' Mutual Insurance Company of New Orleans, in the sum of twenty five hundred dollars, lawful money of the United States of America, to be paid to the said Merchants' Mutual Insurance Company of New Orleans, their heirs, executors, administrators, and assigns, for which payment,

well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 9th day of August,
14 in the year of our Lord 1867.

Whereas the said John Henderson has this day presented a petition to the honorable the fifth district court of New Orleans, praying a writ of injunction against a writ of seizure and sale issued at the suit of the Merchants' Mutual Insurance Company vs. John Henderson and Jos. Ménard, No. 18212 of the docket of said fifth district court:

Now, the condition of the above obligation is, that we, the above-bound John Henderson and John Henderson, jr., will well and truly pay to the said Merchants' Mutual Insurance Company of New Orleans, the defendant in said injunction, all such damages as said company may recover against us, in case it should be decided that the said injunction was wrongfully obtained.

(Signed) JOHN HENDERSON. [L. S.]
(Signed) J. HENDERSON, JR. [L. S.]

Signed, sealed, and delivered in presence of—
(Signed) P. CHA'S CUVELLIER,

15 *Deed annexed to petition.—Filed August 9th*, 1867.

Whereas I, Harry T. Hays, sheriff of the parish of Orleans, by virtue of a writ of seizure and sale to me directed by the honorable the fifth district court of New Orleans, at the suit of Mr. and Mrs. Bressole Gibert vs. Joseph Ménard, No. 17746 of the docket of said court, after having fulfilled and complied with all the previous legal requisites, did seize a lot of ground, with the improvements thereon, situate in the first district of this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having in American measure twenty feet one and one half inch front on Tchoupitoulas street, twenty-eight feet six inches front on said Foucher street, by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-nine feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according
16 to a plan drawn by Hugh Grant, late surveyor, and deposited under the No. 84, in the office of F. Grima, late notary public, in this city.

United States internal revenue stamp, five dollars. $5 00.

And after having given due and legal notice to the said defendant of the said seizure, in the manner pointed out by law, I advertised the said before-described property for sale after the expiration of the legal delay from the time of said notice, to wit, on the 30th day of May, 1867, by advertisements, composed in English and French, announcing the sale to take place at the Merchants' and Auctioneers' Exchange, Royal street, between Canal and Custom-house streets, in the second district of this city, on the first day of July, 1867, at 12 o'clock m. Said advertisements were inserted and published in English and French in two papers in the city of New Orleans, to wit, in the N. O. D'y Picayune and N. O. D'y Bee, from the said thirtieth day of May, 1867, to the day of sale, being full thirty days from the date of the first notice given in said newspapers. Said advertisements were inserted and published in said newspapers on the 30th day of May, 7th, 15th, 22d June, and 1st
17 day of July, 1867, in English, in the N. O. D'y Picayune; and 30th

day of May, and 7th, 15th, 23d days of June, and 1st day of July, 1867, in French, in the N. O. D'y Bee.

And having further complied with and performed all the additional previous legal requisites, and after the said before-described property having been duly appraise', did expose the same at public sale, according to law, at said Merchants' and Auctioneers' Exchange, Royal street, between Canal and Custom-house streets, in the second district of this city, on the said first day of July, eighteen hundred and sixty-seven, at 12 o'clock m.

And at the time and place of sale I did read verbatim, and in a loud and audible voice, the certificate of the recorder of mortgages for the parish of Orleans and city of New Orleans, delivered on the day of sale, and by which certificate it appears that there are no other mortgages standing in the name of Joseph Menard, and recorded against the property herein above described than the following, to wit:

B. 69, f. 676. The one he granted in favor of Mrs. Brissole
18 Gibert, per act before T. Guyol, notary public, dated 19 May, 1857, to secure $4,875 00, interest and costs as per said act; recorded 21st May, 1857, and reinscribed in B. 82, fo. 370, on the 19th May, 1866.

(Written across the face in red ink:)

Erased July 18th, 1867, by certificate of sheriff.

(Signed) MICH'L DE ARMAS, *D'y Sh'ff.*

B. 69, f. 716. The one he granted in favor of Merchants' Insurance Co., per act before same notary public, dated 28th May, 1857, to secure $10,000 00, interest and costs as per said act; recorded 29th May, 1857, and inscribed in B. 84, fo. 696, on the 25th June, 1867.

B. P. 9, fo. 391. The draining privilege.

No. 98. B'k J. M., No. 7, fo. 512; recorded on the 14th December, 1853. The general one in favor of this city resulting from a judgement rendered by the 6th district court on the 29th November, 1853, for the sum of $137 and 50 cents, with interest stipulated in said judgement, and costs of suit against J. Ménard.

(Written across the face in red ink:)

Erased July 18th, 1867, by certificate of sheriff.

(Signed) MICH'L DE ARMAS, *D'y Sh'ff.*

No. 19826. B'k J. M., No. 11, fo. 553; recorded on the 18th December, 1865.

The general one in favor of Robert H. Bailey, resulting from a judgement rendered by the third district court on the 24th November, 1865, for the sum of $2,500 00 and no cents, with interest stipulated in said judgement, and costs of suit against Jas. A. McHatton & al.

19 No. 20441. B'k. J. M., No. 11, fo. 635. Recorded on the 24th March, 1866.

The general one in favor of John T. Delmas resulting from a judgement rendered by the second district court, on the 8th February, 1861, for the sum of $4,560 and 50 cents with interest stipulated in said judgement and costs of suit against J. Menard & al.

No. 16801. B'k J. M., No. 11, fo. 672. Recorded on the 11 May, 1866. The general one in favor of Charles H. Kernion resulting from a

judgement rendered by the fourth district court on the 11th April, 1866 for the sum of $3,750 00 and no cents, with interest stipulated in said judgement and costs of suit against Menard Vignaud.

No. 16268. B'k J. M., No. 11, fo. 676. Recorded on the 18th May, 1866. The general one in favor of Edward Dupasseur resulting from a judgement rendered by the same court on the 16th March, 1866, for the sum of $9,800 00 and no cents, with interest stipulated in said judgement, and costs of suit against the same.

No. 17436. B'k. J. M., No. 12, fo. 130. Recorded on the 11th December, 1866.

The general one in favor of Mr. and Mrs. Gilbert, resulting
20 from a writ issued by the fifth district court on the 17th June, 1867, for the sum of $1,200 00 and no cents, with interest stipulated in said judgement, and costs of suit against Joseph Menard.

(Written across the face in red ink:)

Erased July 18th, 1867, by certificate of sheriff.

(Signed) MICH'L DE ARMAS, *D'y Sh'ff.*

When John Henderson, being the highest and last bidder, the said before-described property was adjudicated to the said John Henderson for the price and sum of five thousand six hundred and twenty-five dollars ($5,625 00) payable cash, and which was settled for in the following manner, to wit:

1st. The purchaser paid me in cash the amount of plaintiff's claim with interest up to the day of sale, and costs of copy of act, say the sum of seventeen hundred and sixty-six dollars and sixty-six cents..... $1,766 66

2d. Said purchaser also paid me in cash the costs and charges, the State and city taxes and the draining claim due on said property, say the sum of three hundred and fifty-nine dollars and twenty-seven cents..... 359 27

3rd. And said purchaser retained in his hands the bal-
21 ance of the price of adjudication and to be by him applied to the payment of the subsequent mortgages as set forth in said mortgage certificate, and which balance amounts to the sum of three thousand four hundred and ninety-nine dollars and seven cents..... $3,499 07

Total am't of sale..... 5,625 00

Now, therefore, know all men by these presents, that I, the said sheriff, in consideration of the premises and by virtue of the laws of the State of Louisiana in such case made and provided, do sell and transfer the said before described property to the said John Henderson and all the rights and titles which the said defendant had in or to the said before-described property, to have and to hold the same to the said John Henderson, his heirs and assigns forever.

In witness whereof I have hereunto signed my name at New Orleans, in the State of Louisiana, this first day of July in the year one thousand eight hundred and sixty-seven, and the ninety-first year of the independence of the United States of America.

22 (Signed) HARRY T. HAYS,
Sheriff of the Parish of Orleans.

Signed in presence of
(Signed) MICH'L DE ARMAS.
(Signed) EDW'D S. WURZBURGER.

Registered conveyance office, B. 92, fo. 570.
New Orleans, 22d July, 1867.
[SEAL] (Signed) LEVI WELLS, *Register.*

State of Louisiana, fifth district court of New Orleans.

I hereby certify that this deed was this day recorded in deed-book O, folio 173, 174, 175, and 176, and now of record in my office.
New Orleans, July 25th, 1867.
[SEAL] (Signed) A. D. BERNOUDY, *D'y Clerk.*

I do hereby certify that the State taxes for the years 1863, 1864, 1865, and 1866; the city taxes for the years 1861, 1862, 1863, 1864, 1865, and 1866; and the draining claim due on the property herein conveyed, have all been paid, as per receipts, certificate, and report on file in the sheriff's office, and that the sum of sixty-five dollars ($65 00) being the proportion for State and city taxes for the year 1867 on same, has been retained by the sheriff.
New Orleans, July 25th, 1867.
23 (Signed) MICH'L DE ARMAS, *D'y Sheriff.*

Writ of injunction.

State of Louisiana, fifth district court of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

The State of Louisiana to the Merchants' Mutual Insurance Company, through John Pemberton its president, and Harry T. Hays, sheriff of the parish of Orleans, greeting:

You are hereby commanded, enjoined and restrained in the name of the State of Louisiana and of the 5th district court of New Orleans from any further proceeding with the writ of seizure and sale issued from this honorable court, in the case of the Merchants' Mutual Insurance Company vs. John Henderson and Joseph Menard, No. 18212, of the docket of this honorable court. And you are so commanded, enjoined, and restrained until the further order of this honorable court.

Witness the Honorable Charles Leaumont, judge of our said court, this 10th day of August, in the year of our Lord one thousand eight hundred and sixty-seven, and in the ninety-second year of the independ-
24 ence of the United States.
[SEAL.] (Signed) A. D. BERNOUDY, *D'y Clerk.*

Return.

Received, August 10th, 1867, and on the same day the sheriff accepted service of copy of the within writ of injunction, and on the 12th day of the same month and year served copy of the within injunction on the Merchants' Mutual Insurance Company, defendant herein, through John Pemberton, president of said company. Returned same day.
(Signed) H. V. GARIDEL, *D'y Sheriff.*

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS., } No. 18234.

Mr. PIERRE POUTZ:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY, *D'y Clerk.*

25 *Return.*

Received, August 14th, 1867, and on the 15th day of the same month and year served a copy of the within citation and accompanying petition defendant, Pierre Poutz, esq'r., personally. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Mr. JOSEPH MENARD:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

(Signed) A. D. BERNOUDY,
D'y Clerk.

Return:

Received, August 14th, 1867, and on the 16th day of August, 1867, served a copy of the within citation and accompanying petition
26 on defendant, Joseph Menard, esqr., by leaving the same at his domicil, No. 198 Burgundy street, into the hands of Miss Mathilde Menard, a white person apparently over fourteen years of age, living and residing in said domicil, the defendant, Joseph Menard, being absent at the time of said service; all of which particulars connected with this service I learned by interrogating the said Miss Mathilde Menard. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. JOHN PEMBERTON,
President Merchants' Mutual Insurance Company.

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

27 *Return.*

Received, August 14th, 1867, and on the 15th day of the same month an' year served copy of the within citation and accompanying petition on the Merchants' Mutual Insurance Company, through John Pemberton, president of said company. Returned same day.

(Signed) H. V. GARIDEL,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. CHARLES H. KERNION:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, August 14th, 1867, and on the 16th day of August, 1867, served a copy of the within citation and accompanying petition
28 on defendant, Charles H. Kernion, esqr., through Theophile Commagere, esqr., who represents himself as sole agent of said Kernion, the said Kernion being now in Paris, France; all of which

particulars connected with this service I learned by interrogating said Theophile Commagere, esqr. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. EDWARD DUPASSEUR:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, August 14th, 1867, and on the 15th day of the same
29 month and year, served a copy of the within citation and accompanying petition on defendant, Edward Dupasseur, esqr., personally. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. HARRY T. HAYS:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, August 14th, 1867, and on the same day the sheriff ac-

cepted service of copy of the within citation and accompanying petition. Returned same day.

(Signed) S. P. FARGE,
D'y Sheriff.

Citation.

30 State of Louisiana, fifth district court of N. Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. ROBERT H. BAILEY:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 14th day of August, in the year of our Lord 1867.

[SEAL.] (Signed.) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, August 14th, 1867, and, after diligent search and inquiry, Robert H. Bailly could not be found. Returned August 31st, 1867.

(Signed) H. V. GARIDEL
D'y Clerk.

Answer of Kernion.—Filed November 5th, 1867.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

31 Before the honorable the fifth district court.

The defendant C. H. Kernion, through his counsel undersigned, now comes into court, and for answer to plaintiff's allegations says that he denies all and singular the allegations set forth in plaintiff's petition; wherefore he prays that plaintiff's suit be dismissed. And as in duty bound, &c.

(Signed) A. ROBERT, *Att'y.*

Answer & reconvention of John T. Delmas.—Filed November 7th, 1867.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234

To the honorable the fifth district court of New Orleans:

The answer of John T. Delmas, who resides in New Orleans, to the petition of John Henderson, respectfully sheweth:

That having obtained a judgment vs. Joseph Menard and Menard and Vignaud, in the second district court, No. 20451 of the docket, res-

pondent issued his execution against said defendants, and under the same seized, in the hands of said Henderson, the sum of $3,499 07,
32 part of the price of property of said Menard, sold by the sheriff to said Henderson, and bought by said Henderson, which sum of $3,499 07 remained over and above the amount of the debt for which the property was adjudicated and accrued in cash to said Menard, and in consequence of this respondents' judgment, judicial mortgage, and seizure aforesaid, is payable to this respondent in satisfaction thereof.

That on issuance of said execution, respondent propounded interrogatories on facts and articles to said Henderson, who has answered that he owed said sum, and he was thereupon legally bound to pay said sum to the sheriff to satisfy respondents' said judgment and execution, but having neglected to do so, this respondent has taken proceedings in the second district court to compel him so to pay.

That the proceedings by injunction herein, (so far as they affect this respondent's right to proceed as aforesaid,) are illegal, null, and void, and conflict with the jurisdiction of the second district court; but so far as they prohibit the seizure and sale by the Merchants' Mu-
33 tual Insurance Company, are just and legal, and should be maintained.

That respondent's judicial mortgage is first in rank, and lawfully takes precedence of the pretended mortgage claimed by said Merchants' Mutual Insurance Company.

That this respondent denies that said Joseph Menard has any other property out of which respondent's judgment can be satisfied.

That by respondent's seizure of the proceeds and price of the property bought by Henderson, respondent has acquired a privilege and preference over all others to be paid out of said price and proceeds.

The pretended mortgage and debt claimed by said Merchants' Mutual Insurance Company are extinguished, null, and void, by virtue of the prescriptions of five and ten years which the said Menard could not waive or renounce to the prejudice of respondent's rights; but, in fact, respondent denies the existence of any such waiver or renunciation, and if any such there be, this respondent charges the same to be false and simulated, and in fraud of his rights.

34 That respondent's mortgage and judgment aforesaid amounts to the sum of..... $4,560 50
With interest at 5 per cent. from 13th April, 1864, to date. 817 09
With sheriff's costs..... 16 00
And with clerk's cost..... 29 39

Making at present a total of..... $5,486 73

as fully appears from the sheriff's statement annexed.

Wherefore petitioner prays that the injunction herein issued by said Henderson so far as it applies to prohibit the Merchants' Mutual Insurance Company and the sheriff be maintained, and that the debt and mortgage claimed by said Merchants' Insurance Company be declared null and void so far as they effect this respondent's judicial mortgage, privilege by execution, and seizure, and so far as they prevent the payment by said Henderson of the amount due to this respondent as aforesaid, to wit:

Five thousand four hundred and eighty-six $\frac{73}{100}$ dollars, with judicial interest from this day till paid.

And petitioner further prays for general relief, &c.

(Signed) COLLENS & WOOLDRIDGE,
Of Counsel.

35 *Order.*

Let the answer and reconventional demand be filed as prayed for and according to law.

New Orleans, November 7th, 1867.

(Signed) CHA'S LEAUMONT, *Judge.*

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. ROBERT H. BAILEY:

You are hereby summoned to comply with the demand contained in the reconvention demand of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the fifth district court of New Orleans, in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 8th day of November, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
Dy Clerk.

Return.

Received, November 9th, 1867, and on the 16th day of March,
36 1868, served a copy of the within answer and reconventional demand and accompanying citation personally on Robert H. Bailey defendant herein. Returned same day.

(Signed) H. K. NIXON,
Dy Sheriff.

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Mr. EDWARD DUPASSEUR:

You are hereby summoned to comply with the demand contained in the answer and reconventional demand of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the fifth district court of New Orleans, in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court the 8th day of November, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
Dy Clerk.

Return.

Received, November 9th, 1867, and on the 11th day of the same

37 month and year served copy of the within citation and accompanying answer and reconventional demand on Edward Dupasseur, esq., defendant herein, through his agent, A. Bidault, esq., personally; all of which particulars I learned by interrogating said A. Bidault, esq. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Mr. JOHN PEMBERTON,
President of the Merchants' Mutual Insurance Company.

You are hereby summoned to comply with the demand contained in the answer and reconventional demand of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

38 Received November 9th, 1867, and on the same day served copy of the within citation and accompanying answer and call in reconvention, on the Merchants' Mutual Insurance Company, defendant herein, through John Pemberton, president of said company. Returned the same day.

(Signed) H. V. GARIDEL,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. CHARLES H. KERNION:

You are hereby summoned to comply with the demand contained in the answer and reconventional demand of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans, in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 8th day of November, in the year of our Lord 1867.

SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, November 9th, 1867, and on the 11th day of the same month and year, served copy of the within citation and accompanying answer and reconventional demand, on Cha's H. Kernion, esq., defend-
39 ant herein, through his agent, Theo. Commagère, esq., personally; all of which particulars I learned by interrogating the said Theo. Commagère, esq. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Citation.

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Mr. PIERRE POUTZ:

You are hereby summoned to comply with the demand contained in the answer and reconventional demand of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 8th day of November, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, November 9th, 1867, and on the 18th day of January, 1868, served a copy of the within answer and claim in reconvention and accompanying citation, personally, on P. Poutz, defendant herein. Returned the same day.

(Signed) H. K. NIXON,
D'y Sheriff.

40 *Citation.*

State of Louisiana, fifth district court of New Orleans, in the city of New Orleans.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Mr. JOSEPH MENARD:

You are hereby summoned to comply with the demand contained in the answer and reconventional demand of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans in ten days after the service hereof.

Witness the Honorable Charles Leaumont, judge of the said court, the 8th day of November, in the year of our Lord 1867.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, November 9th, 1867, and on the 11th day of the same month and year, served copy of the within citation and accompanying answer and reconventional demand, on Joseph Menard, esq., defendant herein, personally. Returned same day.

(Signed) F. B. HERNANDEZ,
D'y Sheriff.

Answer of Merchants' Mutual Insurance Company.—Filed November 13th, 1867.

JOHN HENDERSON
vs.
41 MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 18234.

The defendant in the above-entitled cause denies all and singular the allegations contained in the plaintiff's petition and in the petition of intervention; and he further reiterates the facts and statements contained in his original petition, against which the plaintiff's petition was filed by way of injunction.

Defendant thereof claims to be paid by preference as a special mortgagee, and that plaintiff's and intervenors' demand be rejected with costs.

Prays for general relief, and as in duty bound, &c.

(Signed) A. & M. VOORHIES,
For Def't.

Default.—Extract from the minutes, Thursday, 14th November, 1867.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY.

On motion of P. Cha's Cuvellier, of counsel for plaintiff in the above-entitled case, and upon showing to the court that the following-named parties defendant, although duly cited, have failed to appear and answer within the legal delay, namely, Edward Dupasseur, Pierre Poutz, and Joseph Ménard,

It is ordered that judgment by default be entered against said parties.

42 *Answer of Bayly.—Filed November 14th, 1867.*

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & AL. } No. 18234.

Fifth district court of New Orleans.

Robert H. Bayly, made a part in the above-entitled suit, now comes

into court and for answer to plaintiff's petition, and to the answer and reconvention of John T. Delmas, says—

That he has no interest whatever in the above suit, and no claim to the funds in said plaintiff's hands; and therefore prays to be hence dismissed with his costs, and for general relief.

(Signed) R. H. BAYLY.

Answer of P. Poutz and of Merchants' Insurance Company.—Filed January 30th, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & AL. } No. 18234.

Pierre Poutz and John Pemberton, president of Merchants' Mutual Insurance Co., deny all and singular the allegations contained in the plaintiff's petition, and aver specially that the judgment set forth by John T. Delmas is a nullity on its face, the same having been rendered coram non judice, the second district court of New Orleans not
43 having jurisdiction in the premises. Pray that plaintiff's demand be rejected with costs, and that the injunction sued out be dissolved with costs.

(Signed) A. M. VOORHIES,
For Resp'ts.

Amended answer & interrogatories.—Filed May 1st, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & AL. } No. 18234.

The defendant in the above-entitled suit begs leave to amend his answer for the purpose of alleging as additional facts against the validity of the judgment obtained by John T. Delmas against Menard & Vignaud, that the cause or consideration of the obligation or claim of said Delmas against said Menard was confederate currency, although no such plea was interposed by said Menard; that the judgment in question is not res judicata as regards your respondent, who claims now the right to interpose the illegality of the original transaction in bar of the said Delmas' claim to enforce said illegal claim by preference, on the ground that it is merged in a judgment which has been recorded.

Wherefore respondent prays that the original prayer of his answer be granted, and that the judgment of John T. Delmas be declared
44 null and void and of no effect whatever; and that the said John T. Delmas answer in open court, on the trial of this cause, the following questions, to wit:

1st. What was the consideration of your claim against J. Menard and Menard & Vignaud?

2d. Was the firm of Menard & Vignaud the surety of J. Menard in that transaction?

3d. Was not confederate currency or money given or exchanged on that occasion? State what money was given to Menard. By whom? Gold, silver, or paper, and what paper?

Prays for general relief, and as in duty bound, etc.

(Signed) A. & M. VOORHIES, *Att'ys.*

Order.

Let this amended answer be filed, and let John T. Delmas be ordered to answer under oath in open court, on the trial of this cause, the interrogatories to him herein propounded.

New Orleans, May 1st, 1868.

(Signed) CHAS. LEAUMONT, *Judge.*

Return.

Received May 2nd, 1868. Returned by order of defendant's
45 attorneys May 6th, 1868.

(Signed) H. K. NIXON,
Dy Sheriff.

Testimony.—Filed May 4th, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. } No. 18234.

Plaintiff offers in evidence the record of suit No. 17746 of this court, on which this fiat was issued, also the return of the sheriff in the same record; also the deed dated July 1st, 1867, recorded in fleed-book in the clerk's office, (for deed see page 20 to 31;) also the original mortgage certificate read at the sale, dated 1st July, 1867. The transcript of the record of Delmas vs. Menard & Vignaud, No. 20441, page 121, second district court; the whole record of suit No. 18212, in this court, "Merchants' Mutual Insurance Company vs. Henderson & Menard," including the notes and mortgage, (p. 100 & 106.)

On behalf of Delmas, counsel offers the proceedings in the case of "Delmas vs. Menard & Vignaud," the whole record, No. 20441, second district, p. 121; the certificate of the recorder of mortgages showing the recording of the judgment in the second district court, the
46 writ of fieri facias in the same case now in the sheriff's hands.

On behalf of the Merchants' Mutual Insurance Company, counsel offer in evidence the letter of the 13th July, 1866, this day filed. (It is admitted that the date of the letter should be 1867, not 1866.)

JOHN T. DELMAS, sworn to answer interrogatories to him propounded.

Answer to 1st int'y. It was for the fulfilment of the contract, damages for not complying with the contract, & for money advanced on the contract.

(Contract annexed to answer offered in evidence.)

Answer to 2nd int'y. They were.

Answer 3rd int'y. No, sir.

Answer to 4th int'y. There was no money given.

Answer to 5th int'y. A *clerk.*

Witness further examined on the stand, says:

Q. Do you know what check was?

A. I do not.

Q. Can you say it was not paid in coufederate money?

A. I cannot; how can I say? I was not paying teller of the bank.

Q. What money did you have deposited in the bank; was it confederate money?

A. I don't recollect. I generally kept an account like any other man

and sometimes had a balance of three, four, and as much as ten
47 thousand.

Q. At that time were not the whole payments of the bank in confederate money?

A. I don't know. I think it is very likely it was so.

Q. Did you have a gold deposit at that time?

A. I think not. I had a considerable balance of city money of their own currency—their original currency—some four, five, or six thousand dollars, perhaps more, at the time the banks commenced paying in confederate money.

Q. What city currency was that?

A. Notes of the Bank of Louisiana, Citizens' Bank, and such issues as these banks issued.

Q. At that time did you expect your checks to be paid in bank notes or confederate notes?

A. I suppose they paid in confederate notes. I don't know.

Q. Did you have any silver deposited in that bank that you could draw?

A. No, sir; there was no gold or silver in circulation then.

Q. You cannot affirm, then, that check was not paid in confederate currency?

A. No, sir.

Cross-examined:

Q. At the time the banks suspended their payments in silver and gold, their own notes and bank notes, and substituted confederate money, I understand you to say you had a large balance in that
48 bank at this time?

A. I think I had. I always kept an account with them and always had a balance; sometimes considerable.

Q. The deposits you had made were credited purely and simply as so many dollars?

A. So many dollars and cents.

Q. And the check you drew was for so many dollars plain, without any qualification?

A. None whatever.

Q. You don't know what use Mr. Menard made of that check?

A. I don't know what he did with it.

(It is admitted that the note held by the Merchants' Insurance Company, and on which the order of seizure and sale was issued—that upon that note (the date being 1857) there is no stamp whatever, and that there is no stamp on any of the renewals on the back. It is admitted that the signatures on the notes of Menard and the Merchants' Insurance Company are genuine.)

RECORD NO. 17746.—*Offered in evidence by plaintiff.*

Petition.—Filed May 17th, 1867.

MR. AND MRS. BRESSOLE GIBERT
vs.
JOSEPH MENARD. } No. 17746.

49 To the honorable the judge of the fifth district court of New Orleans:

The petition of Mr. and Mrs. Bressole Gibert, who reside in Paris, France, respectfully represents—

That Joseph Menard, a resident of the city of New Orleans, is justly and truly indebted unto your petitioners in the full sum of twelve hundred dollars, ($1,200 00,) exclusive of interest and costs, now due and exigible, with special mortgage and privilege of vendor on the following property, to wit:

A lot of ground with the improvements thereon situated in this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having in American measure, twenty feet one inch and a half front on Tchoupitoulas street; twenty-eight feet six inches front on said Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette; and one hundred and thirty-nine feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant and deposited under the No. 84 in the office of F. Grima,
50 late notary in this city, being the same property acquired by the said vendor from the succ'n of Jno. Duyer, by act before the said Grima, notary, on the 5th July, 1842; for this to wit:

That petitioners are holders and bona fide owners of a certain promissory note for the sum of twelve hundred and eighteen dollars and seventy-five cents, ($1,218 75,) drawn by said Joseph Menard, to the order of and endorsed by himself, dated at New Orleans on the 19th day of May, 1857, and payable four years after date, with interest at the rate of six per cent. per annum from date until maturity, and at eight per cent. per annum from maturity until paid, being one of four promissory notes furnished by the said Joseph Menard, the purchaser of the afore-described property, and paraphed "ne varietur" in order to identify it with the act of sale of 19th day of May, 1857, which does specially mortgage and hypothecate the afore-described property, and with special privilege of vendor in order to secure the full and punctual payment of the aforesaid note with interest from date at the rate of six per cent. per annum till maturity, and thereafter at the rate of eight per cent. per annum till paid, as the whole more fully
51 appears by referring to the authentic copy of act, and to the said note, which are hereto annexed for reference and made part of this petition.

Petitioners aver that the said note having matured, payment was extended one year from the 22nd day of May, 1861, as appears by the endorsement on said note signed by Joseph Menard, and on said day, 22nd of May, 1861, and account of three hundred and eleven dollars and twenty-five cents was paid on said note, as is shown by the credit endorsed thereon.

Petitioners aver further that on the 22nd day of May, 1862, at maturity, said note not having been paid and still remaining, is now past due and exigible, and that amicable demand thereof has been made, but unsuccessfully.

Wherefore the premises being duly considered, petitioners pray this honorable court to order the sheriff of the parish of Orleans to seize and sell the above described property, specially mortgaged and hypothecated with privilege of vendor, and importing confession of judgment, in order to pay and satisfy with the aforesaid privilege of vendor and mortgage lien, their claim of twelve hundred dollars ($1,200 00)
52 with interest at the rate of six per cent. per annum thereon from the 22nd day of May, 1867, to the 22nd day of May, 1862, and at the rate of eight per cent. per annum thereafter until paid finally, together with four dollars cost of copy of act, and costs of suit, etc.;

and your petitioners also pray that due notice of these proceedings be given to the defendant in this suit, and also for such other relief as he may be entitled to by law, justice, and the nature of this case. And as in duty bound your petitioner will ever pray.

(Signed) A. L. TISSOT,
Of Counsel.

Order.

Let a writ of seizure and sale issue in this case as within prayed for, and according to law.

New Orleans, May 17th, 1867.

(Signed) CHAS. LEAUMONT.

Act annexed to petition.—Filed May 17th, 1867.

UNITED STATES OF AMERICA,
State of Louisiana:

Be it known that on this nineteenth day of the month of May, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America the eighty-first, before me, Theodore Guyol, a notary public duly commissioned and sworn
53 for the parish and city of New Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Theodore B. Blanchard, of this city, herein acting as the agent of Mrs. Augustine Audriel, widow of Philip C. Leiris, and now the wife of Bressole Gibert, of Paris, by virtue of an act of procuration executed before the United States counsel residing at Paris aforesaid, on the 23rd April last, and hereto annexed for reference, who declared that he does by these presents grant, bargain, sell, assign, convey, transfer, and deliver with full warranty, in his said capacity, unto Joseph Menard of this city, present, accepting and acknowledging possession, a lot of ground with the improvements thereon situate in this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having in American measure twenty feet one inch and a half front on Tchoupitoulas street; twenty-eight feet six inches front on said Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street; and one hundred and thirty-nine feet four inches
54 and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant, and deposited under the No. 84 in the office of F. Grima, late notary in this city; being the same property acquired by the said vendor from the succ'n of Jno. Duyer, by act before the said Grima, notary, on the 5th July, 1842.

According to the annexed certificate of the recorder of mortgages for this parish, the said property is free from encumbrance and there are no taxes due thereon, as per the receipts exhibited to the undersigned notary.

To have and to hold the said property, rights, &c., unto the said purchaser, his heirs and assigns forever.

And the said vendor moreover transfers unto the said purchaser all the rights and actions of warranty to which his constituent is entitled against all the former owners and proprietors of the property herein conveyed, subrogating the said purchaser to the said rights and actions

to be by him enjoyed and exercised in the same manner as they might have been by the said constituent.

55 This sale is made for the price and sum of sixty-five hundred dollars and interest as hereinafter expressed, sixteen hundred and twenty-five dollars of which have been paid in ready money by the said purchaser, and for the balance he has given his four promissory notes for twelve hundred and eighteen dollars and seventy-five cents each, drawn to the order of, and endorsed by, himself, dated this day, and payable at the Bank of Louisiana, in this city, in one, two, three, and four years after date, with interest at six per cent. per annum from date until maturity, and thereafter until paid at eight per cent. per annum; which notes, after being paraphed by me, notary, to identify them with this act, were delivered to the said Blanchard, who, in his capacity, acknowledges the receipt thereof as well as of said ready money.

And in order to secure the payment of said notes and interest, the said purchaser hereby specially mortgages and hypothecates the said property to his vendor, with promise not to sell, alienate, or encumber the same to the prejudice of this act.

Done and passed in my office in presence of William G. Lathan
56 and Paul Abat, witness, who have signed with the parties and me, notary, after reading the whole.

(Original signed) T. BAILEY BLANCHARD, JR.
JOSEPH MENARD.
P. ABAT.
N. G. LATHAN.
THEO. GUYOL, *Not. Pub.*

I hereby certify the foregoing to be a true copy, transcribed from the original act of record on file among the archives of Theodore Guyol, late notary, of whom I am the successor in office.

In faith whereof I grant these presents under my signature, and the impress of my seal of office, at New Orleans, this 11th day of May, A. D. 1867.

[SEAL.] (Signed) PROSPER CAMUS,
Not. Pub.

Writ of seizure and sale.

State of Louisiana, fifth district court of New Orleans.

MR. AND MRS. BRESSOLE GIBERT
vs.
JOSEPH MENARD. } No. 17746.

The State of Louisiana to the sheriff of the parish of Orleans, greeting:

You are hereby commanded, in the name of the State of Louisiana and of the fifth district court of New Orleans, to seize and sell for
57 cash the following-described property: A lot of ground, with the improvements thereon, situate in this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having, in American measure, twenty feet one inch and a half front on Tchoupitoulas street, twenty-eight feet six inches front on said Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-nine feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant, and deposited, under

the No. 84, in the office of F. Grima, late notary in this city, being the said property acquired by the said vendor from the succ'n of Jno. Droyer by act before the said Grima, notary public, on the 5th July, 1842, and out of the proceeds of said sale to pay and satisfy plaintiff's claim, amounting to twelve hundred dollars, with six per cent. per annum thereon from the 22nd day of May, 1861, to the 22nd of May, 1862, and at the rate of eight per cent. per annum thereafter until paid, to-
58 gether with four dollars costs of copy and costs of suit.

And what you do in the premises you make return thereof, together with this writ, to our said court, as the law directs.

Witness the Honorable Charles Leaumont, judge of our said court, this 17th day of May, in the year of our Lord one thousand eight hundred and sixty-seven, and in the ninetieth year of the independence of the United States.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

Return.

Received, May 17th, 1867, and on the 21st day of the same month and year served copy of the within notice of demand of payment and accompanying petition personally on defendant herein; and said defendant not having paid within the legal delay, I did seize, on the 25th day of same month and year, the within-described property and notified personally the defendant herein of said seizure. And after the legal delay having expired, the said property was advertised for sale on the 30th day of May, 1867, in the following manner, to wit: By advertisements composed in English and French, announcing the sale
59 to take place at the Merchants and Auctioneers' Exchange, on Royal street, between Canal and Custom-house streets, in the second district of this city, on the first day of July, 1867, at 12 o'clock m. Said advertisements were inserted and published in English and French in two papers in the city of New Orleans, to wit, in The New Orleans Daily Picayune and The New Orleans Daily Bee, from the said 30th day of May, 1867, to the day of sale, being full thirty days from the date of the first notice given in said newspapers. Said advertisements were inserted and published in said newspapers on the 30th May, 7th, 15th, and 25th of June, and 1st of July, 1867, in English, in The New Orleans Daily Picayune, and in French in The New Orleans Daily Bee.

And after having further complied with, and performed all the additional previous legal requisites, and after the said property having been duly appraised, did expose the same at public sale, according to law, at said Merchants and Auctioneers' Exchange, on Royal street, between Canal and Custom-house streets, in the second district of this city, on the said first day of July, eighteen hundred and sixty-seven, at 12
60 o'clock m.; and having first announced in a loud and audible voice the terms and conditions hereinafter expressed and specified, and having also read verbatim and in a loud and audible voice the certificate of the recorder of mortgages for the parish of Orleans and city of New Orleans, delivered on the day of sale, and showing the mortgages and liens existing at the time of sale, in the name of said defendant against the said property—

When John Henderson, being the highest and last bidder, the said property was adjudicated to the said John Henderson for the price and sum of five thousand six hundred and twenty-five dollars, payable cash, and which was settled in the following manner, to wit:

1st. The purchaser paid me in cash, the amount of plaintiff's claim, with interest up to the day of sale, and costs of copy of act, say the sum of seventeen hundred and sixty-six dollars and six cents, say $1,766 66

2d. Said purchaser also paid me in cash the costs, charges, and the State and city taxes, and draining claim due on said property, say the sum of three hundred and
61 fifty-nine dollars and twenty-seven cents, say..... $359 27

3d. And the purchaser retained in his hands the balance of the price of adjudication to be by him applied to the payment of the subsequent mortgages as set forth in said certificate of mortgage, and which balance amounts to the sum of three thousand four hundred and ninety-nine dollars and seven cents, say..... 3,499 07

Amount of sale $5,625 00

On the ninth day of July, 1867, paid J. L. Tissot, attorney for plaintiff, amount of claim with interest and costs of copy of act.

Returned satisfied this 21st day of August, 1867.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

Charges.

Printing, E., Picayune	$15 00
Do. F., Bee	15 00
Do. G'r'm paper	13 50
Clerk's fees	13 30
Sheriff's do., Hays	9 00
Certificate of mortgage	6 00
Erasing mortgages & process verbal	3 50
Commission on sale	38 12
Exchange duty	6 00
62 Appraisers' fees, L. E. Gardette and P. T. Abadie	20 00
C. A. De Armas for plan	15 00
U. S. int. rev. stamps for deed of sale	6 00
	$160 42
Draining claim, 6th installment	1 15

Taxes.

State tax, 1863, not found at auditor's	
Do. 1864	12 70
Do. 1865, not found at auditor's	
Do. 1866	22 50
City tax, 1861 }	
Do. " 1862 }	
Do. " 1863 } Paid, as per report on file	
Do. " 1864 }	
Do. " 1865 }	
Do. " 1866, appraised @ $6,000 00	90 00
Proportion for State & city taxes, 1867	65 00
Searches & commission	7 50
	$359 27

Amount of claim	$1,200 00
6 % int. thereon from 22 May, 1861, to 22 May, 1862	72 00
8 % " " " " " 1862, to day of sale, (5 years and 40 days)	490 66
Costs of copy of act	4 00
	$1,766 66

Notice annexed to writ.

NEW ORLEANS, *May 25th*, 1867.

In the 5th district court of New Orleans, sheriff's office, parish of Orleans.

63 MR. & MRS. BRESSOLE GIBERT *vs.* JOSEPH MENARD. } No. 17746.

To JOSEPH MENARD:

Take notice that I have seized and in three days from the service hereof, shall proceed to advertise and sell according to law:

A lot of ground, with the improvements thereon, situate in this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets, and having in American measure twenty feet one inch and a half front on Tchoupitoulas street, twenty-eight feet six inches front on said Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-nine feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant, and deposited in the office of F. Grima, late a notary public in this city.

To pay and satisfy the writ issued in this case, say the sum of $1,200 00 with interest and costs, unless the same is immediately paid.

(Signed) W. E. KENNEDY,
D'y Sheriff.

64 *Return.*

On the 25th day of May, 1867, served copy of within notice of seizure personally on Joseph Menard, defendant herein. Returned same day.

(Signed) L. E. GARDETTE,
D'y Sheriff.

Notice annexed to writ.

NEW ORLEANS, *May 17th*, 1867.

In the 5th district court of New Orleans, sheriff's office, parish of Orleans.

MR. & MRS. BRESSOLE GIBERT *vs.* JOSEPH MENARD. } No. 17746.

To JOSEPH MENARD:

Take notice that payment is demanded of you at my office, within

three days from the service hereof, of the amount claimed in the accompanying petition, with interest and costs, and in default of payment within that delay, the property referred to in said petition will be seized and sold according to law.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

Return.

On the 21st day of May, 1867, served copy of the within notice of demand of payment and accompanying petition personally on
65 defendant herein. Returned same day.

(Signed) L. E. GARDETTE,
D'y Sheriff.

RECORD, No. 18212.—*Offered in evidence by plaintiff.*

Petition.—Filed August 1st, 1867.

MERCHANTS' MUTUAL INSURANCE COMPANY
vs.
JOHN HENDERSON & JOSEPH MENARD. } No. 18212.

To the honorable the fifth district court of New Orleans:

The petition of John Pemberton in his capacity of president of the Merchants' Mutual Insurance Company, a chartered corporation domiciled in the city of New Orleans, respectfully shows:

That he is the holder and owner of a certain promissory note for the sum of five thousand dollars, subscribed by Joseph Menard to his own order and by him endorsed in blank; said note is dated at New Orleans, May the 28th, 1857, and made payable one year after date, with interest at the rate of eight per cent. per annum from maturity, until paid.

That the interest due thereon has been paid up to May 28th, 1861, by agreement entered into petitioner and Joseph Menard. On the
66 16th day of March, 1866, the payment of said note was extended to the 1st day of December, A. D. 1866, without novation, for five thousand dollars.

That said note is secured by mortgage with the pact de non alienanda on the following property, to wit:

A certain lot of ground with the improvements thereon, situate in this city, in the square bounded by Girod, Tchoupitoulas, Lafayette, and Foucher streets, and having in American measure twenty feet one inch and a half front on Tchoupitoulas street, twenty-eight feet six inches front on Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-nine feet four inches in depth on the line towards Girod street, which divides it from the property of the estate of A. Philips, the whole as per plan drawn by Hugh Grant, and deposited as plan No. 84 in the office of F. Grima, late notary in this city, being the same property purchased by the said Menard from Mrs. Bressole Gibert by an act passed in the office of Theodore Guyol, notary public in this city, on the 19th day of May, A. D. 1857.

That said act was inscribed in the office of the recorder of mort-
67 gages of the city of New Orleans, on the day of , in the year of our Lord eighteen hundred and fifty, in "B" 69, folio 716, and was again reinscribed on the day of , in the year eighteen hundred and sixty in "B" 84, folio 696.

All of which will more fully appear by the note sued upon and copy of act of mortgage hereto annexed for reference and made part of this petition.

Petitioner further avers that the above-described property is now held and possessed by John Henderson, of the city of New Orleans, who, although repeatedly & amicably requested to pay petitioner's claim, refuses to do so; that the principal debtor, Joseph Menard, also refuses payment of said claim, although thereunto amicably requested for more than thirty days previous to this action.

Wherefore, the premises considered, petitioner prays for an order of seizure and sale in due course of law, under executory process against the above-described property; that said property be seized and sold to satisfy the sum of five thousand dollars, with interest thereon at the rate of eight per cent. per annum from the first day of December, A. D. 1866, until paid, besides five per cent. on said amount, attorney's fees, secured by said mortgage; that demand of payment and notice
68 of seizure be served upon Joseph Menard and John Henderson.

And further prays for all general and equitable relief, and as in duty bound, etc.

(Signed) A. & M. VOORHIES,
Of Counsel.

Affidavit.

STATE OF LOUISIANA, *City of New Orleans:*

Before me, the undersigned authority, personally came and appeared John Pemberton, who being duly sworn, states that facts and allegations contained in the foregoing petition are true and correct, so help me God.

(Signed) JOHN PEMBERTON.

Sworn to & subscribed before me this 1st day of August, A. D. 1867.

(Signed) PAUL W. COLLENS, *3rd J. P.*

Order.

Let the prayer be granted. It is therefore decreed that executory process issue as prayed, in conformity with said prayer.

New Orleans, August 1st, 1867.

(Signed) G. DUPLANTIER,
Judge 6th District Court of New Orleans,
Acting in the absence of Judge Chas. Leaumont.

Note annexed to petition.—Filed August 1st, 1866.

69 $5,000 00. NEW ORLEANS, *May 28th*, 1867.

One year after date I promise to pay to the order of myself five thousand dollars, value received, with interest at the rate of eight per cent. per annum from maturity until paid.

(Signed and endorsed) JOSEPH MENARD.

(Written in red ink across the face:)

Ne varietur.

New Orleans, May 28th, 1857.

(Signed) THEO. GUYOL, *N. P.*

Partial release granted per act passed before me this day.
New Orleans, 9th July, 1858.
(Signed) E. G. GOTTSCHALK, *N. P.*

(Endorsed:)
The payment of this note is extended to one year from this date, interest, am'ting to four hundred dollars, paid.
New Orleans, May 28th, 1858.
(Signed) JOHN PEMBERTON.

The payment of this note is extended to one year from this date, interest, amounting to four hundred dollars, being paid.
New Orleans, May 30th, 1859.
(Signed) JOHN PEMBERTON.

The payment of this note is hereby extended to one year from this date by payment of four hundred dollars interest in advance, this day received.
New Orleans, May 31st, 1860.
(Signed) P. FOURCHY, *Sec't'y.*

NEW ORLEANS, *March 16th*, 1866.

The payment of this note is, without novation, hereby extended to 1st December, 1866, for five thousand dollars.
(Signed) P. FOURCHY.
(") JOSEPH MENARD.

70 *Act annexed to petition.—Filed August 1st*, 1867.

28th May, 1857.—Mortgage.—Joseph Menard to Merchants' Mutual Insurance Co.

UNITED STATES OF AMERICA,
State of Louisiana:

Be it known that on this 28th day of the month of May, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America the eighty-first, before me, Theodore Guyol, a notary public duly commissioned and sworn for the parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally appeared Joseph Menard, residing in this city, who declared and acknowledged that he is justly and indebted unto the Merchants' Insurance Company, a corporate body created and established in this city, in the sum of ten thousand dollars, for which amount he has given and furnished his three several promissory notes, drawn to the order of, and endorsed by, himself, dated this day, one for the sum of five thousand dol-
71 lars and two for the sum of two thousand five hundred dollars each, all bearing interest at the rate of eight per cent. per annum from and after maturity, until paid, and made payable one year after date which notes after being paraphed by me, notary, to identify them with this act, were delivered to John Pemberton, of this city, president of the said company, who is here present, and in such capacity acknowledges the receipt thereof.

And in case it shall become necessary to institute legal proceedings for the recovery of the amount of the said notes or of any part thereof, the said Menard binds himself to pay the fees of the attorney at law

who may be employed for that purpose, which fees are hereby fixed at five per cent. on the amount sued for.

Now, therefore, in order to secure the punctual payment of the said notes at maturity, together with all eventual interest and attorney's fees, the said Menard declared that he does, by these presents, mortgage, affect, and specially hypothecate, in favor of the said company, and to enure to the use and benefit of any and all future holder or holders of the said notes, the said Pemberton being here present and accept-
72 ing for the said company.

1st. A certain lot of ground, with the improvements thereon, situate in this city in the square bounded by Girod, Tchoupitoulas, Lafayette, and Foucher streets, and having in American measure twenty feet one inch and a half front on Tchoupitoulas street, twenty-eight feet six inches front on Foucher street by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and thirty-nine feet four inches and five lines in depth on the line towards Girod street, which divides it from the property of the estate of A. Philips, the whole, as per plan drawn by Hugh Grant, and deposited as plan No. 84 in the office of F. Grima, late notary in this city, being the same property purchased by the said Menard from Mrs. Bressole Gibert by an act passed in this office on the 19th day of the present month.

2d. And a lot of ground, with the improvements thereon, situate in the second district of this city, on Rampart street between Dumaine and St. Anne streets, designated by the No. three on a plan drawn by de Armas, dated 12th April, 1850, and deposited in the office of A.
73 Boudousquié, notary, the said lot having in American measure thirty-two feet two inches and six lines front on Rampart , by one hundred and five feet four inches in depth between parallel lines, being the same property purchased by the said Menard from Mr. J. B. Dolhoude by act passed before said Boudousquié, notary, on the nineteenth day of the present month. And the said Menard does hereby promise and bind himself, not to sell, alienate, or encumber the said property to the prejudice of this act. According to the annexed certificate of the recorder of mortgages for this city there are no other mortgages in the name of said Menard and recorded against the said described property than the following:

1st. The one he granted by a clause in his act of purchase of the property firstly described to secure four thousand eight hundred & seventy-five dollars & interest; 2d, and the one in favor of the city of New Orleans for the sum of $57 80, and another in favor of the said city for the sum of $10 70, interests and costs. And the said
74 Menard does hereby bind himself to procure and furnish within a delay of six months from this date a renunciation in due form of law from his wife, in favor of the said company, of all her matrimonial, dotal, paraphernal, and other rights, claims, and mortgages in the said described property.

Done and passed in my office, at the city of New Orleans, on the day, month, and year first above written, in the presence of William G. Latham and Paul Abat, competent witnesses, who have signed with the parties and me, notary, after reading the whole.

(Original signed) JOSEPH MENARD.
JOHN PEMBERTON, *President.*
W. G. LATHAM.
P. ABAT.
THEO. GUYOL, *Not. Pub.*

I, Ernest Eude, a notary public duly commissioned and sworn in and for the parish of Orleans, State of Louisiana, residing in the city of New Orleans, do hereby certify the foregoing act to be a true copy of the original act on file in the notarial records of Theodore Guyol, late
75 a notary public in this parish of Orleans, which are in my possession as custodian thereof.

New Orleans, September 9th, A. D. 1865.

[SEAL.] (Signed) E. EUDE,
Notary Public, General Custodian of all Notarial Records of Persons out of Office.

Writ of seizure and sale.

State of Louisiana, fifth district court of New Orleans.

MERCHANTS' MUTUAL INSURANCE COMPANY *vs.* JOHN HENDERSON & JOSEPH MENARD. } No. 18212.

The State of Louisiana to the sheriff of the parish of Orleans, greeting:

You are hereby commanded, in the name of the State of Louisiana and of the fifth district court of New Orleans, to seize and sell according to law the following described property, to wit: A certain lot of ground, with the improvements thereon, situated in this city, in the square bounded by Girod, Tchoupitoulas, Lafayette, and Foucher streets, and having, in American measure, twenty feet one inch and half front on Tchoupitoulas street, twenty-eight feet six inches front on
76 Foucher street, by one hundred and thirty-nine feet seven inches and two lines in depth and front on Lafayette street, and one hundred and nine feet four inches in depth on the line towards Girod street, which divides it from the property of the estate of A. Philips, the whole as per plan drawn by Hugh Grant, and deposited as plan No. 84 in the office of F. Grima, late notary in this city, being the same property purchased by the said Menard from Mrs. Bressole Gibert by an act passed in the office of Theodore Guyol, notary public in this city, on the 19th of May, 1857, and out of the proceeds of said sale to pay and satisfy plaintiff's claim, amounting to five thousand dollars, with interest at the rate of eight per cent. per annum from the 1st December, A. D. 1866, until paid, five per cent. on said amount attorney's fees, and all costs of suit.

And what you do in the premises you make return thereof, together with this writ, to our said court, as the law directs.

Witness the Honorable Charles Leaumont, judge of our said court, this 2nd day of August, in the year of our Lord one thousand eight hundred and sixty-seven, and in the 92nd year of the independence of the United States.

[SEAL.] (Signed) A. D. BERNOUDY,
D'y Clerk.

77 *Return.*

Received, August 2nd, 1867, and on the third day of same month and year served copy of the within annexed notice of demand of payment and accompanying petition personally on Joseph Menard, one of the defendants herein; and on the sixth day of same month and year served a similar copy of the within annexed notice of demand of pay-

ment and accompanying petition personally on John Henderson, one of the defendants herein, when, on the 10th day of August, 1867, from issue to the day of seizure this writ was stayed by injunction.

This return is made up to the present time for the purpose of enabling the clerk to complete a transcript of appeal herein taken. The clerk is requested to return this writ to the sheriff, after copying the same.

Returned up to the 24th day of June, 1868.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

Notice annexed to writ.

NEW ORLEANS, *August 2nd*, 1867.

In the 5th district court of New Orleans.

MERCHANTS' MUTUAL INSURANCE COMPANY
vs.
JOHN HENDERSON & JOSEPH MENARD. } No. 18212.

78 SHERIFF'S OFFICE, *Parish of Orleans:*

To JOHN HENDERSON and JOSEPH MENARD:

Take notice that payment is demanded of you at my office within three days from the service hereof of the amount claimed in the accompanying petition, with interest and costs; and, in default of payment within that delay, the property referred to in said petition will be seized and sold according to law.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

Return.

On the third day of August, 1867, served copy of the within notice of demand of payment and accompanying petition personally on Joseph Menard, one of the defendants herein; and on the sixth day of same month and year served a copy of notice of demand of payment and accompanying petition personally on John Henderson, one of the defendants herein.

(Signed) JOHN L. LEWIS,
D'y Sheriff.

RECORD No. 20441.—*Second district court of New Orleans.—Offered in evidence by plaintiff.*

Petition.—Filed April 13th, 1864.

79 JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

To the Honorable R. K. Howell, judge of the second district court of New Orleans:

The petition of John T. Delmas, residing in this city, with respect, shows that Joseph Menard, and his firm of Menard & Vignaud, composed of Joseph Menard, Benoist O. Vignaud, and Lucien Menard, of

this city, are justly indebted unto your petitioner, jointly and in solido, in the full sum of two thousand six hundred and twenty-five dollars, and in the further sum of five hundred dollars damages sustained by your petitioner and making the total sum of three thousand one hundred and twenty-five dollars for this, to wit:

That the said Joseph Menard, by written contract entered into with your petitioner, obligated himself to deliver to your petitioner two hundred and fifty thousand first quality V. Chopin's building bricks at the price of eight dollars and twenty-five cents per thousand, which price was acknowledge' by the said Joseph Menard to have been paid in full by your petitioner, and the said Menard undertook to
80 make full and complete delivery of the said bricks within four months from the date of said agreement, which agreement was signed on the 3d day of March, 1862, and to receive the faithful performance of said contract on the part of said Joseph Menard, his firm of Menard & Vignaud, composed of him, the said Joseph Menard and Benoit O. Vignaud obligated and bound themselves jointly and in solido with the said Joseph Menard, *with the said Joseph Menard*, unto your petitioner for the faithful delivery of said bricks.

Your petitioner further shows that by mutual agreement the time for the delivery of the said bricks was extended eight months from the 3rd of July, 1862, as the whole will fully appear by said contract herewith filed as part of this petition.

Your petitioner further shows that the price of bricks has considerably augmented since said contract was entered into, and that had said bricks been delivered as agreed upon, your petitioner could have sold them at considerable profit, if he had not used them for building on his own account; that said Joseph Menard has been repeatedly called upon to fulfill his contract aforesaid, but that he has neglected, refused,
81 and omitted to fulfill the same, to the prejudice and injury of your petitioner, who claims the sum of five hundred dollars damages suffered by him by the unexecution of said contract on the part of the said Joseph Menard.

Wherefore, the premises considered, petition prays that the said Joseph Menard, individually, and his firm of Menard & Vignaud, be summoned to answer this petition, and that, after due legal proceedings, the said Joseph Menard and the said firm of Menard & Vignaud be condemned jointly and in solido to pay your petitioner the aforesaid sum of two thousand six hundred and twenty-five dollars, paid by him for said bricks in advance of their delivery, together with five hundred dollars damages, making the total sum of three thousand one hundred and twenty-five dollars, and all costs of suit; for which petitioner prays judgment as aforesaid.

And petitioner prays for all further and general relief.

(Signed) ROBERT J. KER,
Att'y for Pet'r.

Petition in French.

82 A l'honorable R. K. Howell, juge de la seconde cour de district de la Nouvelle Orleans:

La pétition de John T. Delmas, demeurant en cette ville, démontre respectuesement que Joseph Menard et sa raison sociale de Menard & Vignaud composée de Joseph Menard et de Benoit O. Vignaud et Lucien Menard, de cette ville, sont justement endettés à votre pétitionaire conjointement et in solido, dans la somme totale de deux mille six cent

vingt-cinq piastres, et de plus cinq cent piastres pour dédommager votre petitionaire des pertes qu'il a essuyées faisant la somme de trois mille cent vingt-cinq piastres pour ceci; que le dit Joseph Menard par écrit contractat avec votre petitionaire, de lui fournir deux cent cinquante mille briques pour batisses 1re qualité de V. Chopin, a huit piastres et vingt-cinq sous le mille, laquelle consideration a été reçue par le dit Joseph Ménard en plein, ainsi qu'il le reconnait et le dit Joseph Menard s'obligea à livrer les sus-dites briques dans quatre mois de la date
83 du dit contrat, qui fut signé le 3 Mars, 1862, et afin d'assurer l'exécution du dit contrat de la part du dit Joseph Menard sa raison sociale de Menard & Vignaud se rendit responsable conjointement et in solido avec le dit Joseph Menard pour la livraison ponctuelle des dites briques, à votre petitionaire.

Votre petitionaire expose de plus que par consentement mutuelle, le temps donné pour la livraison des dites briques a été prolongée à huit mois, du trois Juillet, 1862; ainsi que le tout apparaitra par le dit contrat ci-annexé.

Votre petitionaire soumait de plus que le prix des briques a considérablement augmenté depuis la date du dit contrat, et que si les briques avaient été livrées, ainsi qu'il est stipulé, il aurait pu les vendre à un fort profit s'il ne s'en était pas servi pour bâtir a son propre compte; que le dit Joseph Ménard a été maintefois appelé à l'exécution du dit contrat, mais qu'il avait négligé, omis et refusé d'y donner son attention, au préjudice du dit petitionaire, qui reclame la somme de cinq cents piastres pour dommages essuyés par lui, par cause de l'inexecu-
84 tion du dit contrat de la part du dit Joseph Menard.

En conséquence votre petitionaire prie que le dit Joseph Menard individuellement, et que sa dite raison sociale de Menard & Vignaud conjointement et in solido avec lui, le dit Menard soient cités pour répondre à cette petition, et que toutes les formalités légales ayant été remplis, ils soient condamnés à payer au petitionaire la sus-dite somme de deux mille six cents vingt-cinq piastres payée par lui pour les dites briques d'avance, avec cinq cents piastres de dommages, faisant la somme totale de trois mille cent vingt-cinq piastres, et tous frais de poursuits, pour lesquels petitionaire demande jugement.

Et votre petitionaire prie pour tout autres secours nécessaires.

(Signé) ROBERT J. KER,
Avocat.

Citations F. & E.

State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Messrs. MENARD & VIGNAUD:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation or deliver
85 your answer to the same in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable R. K. Howell, judge of the said court, the 13th day of April, in the year of our Lord 1864.

(Signed) A. MOREL,
Dy Clerk.

Etat de la Louisiane deuxième cour de district de la Nouvelle Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Mess'rs MENARD & VIGNAUD:

Vous êtes sommé de satisfaire à la demande contenue dans la petition, dont une copie et ci-annexée ou de remettre votre réponse au bureau du greffier de la deuxième cour de district de la Nouvelle Orleans, dix jours après sa notification.

Temoin l'honorable R. K. Howell, juge de la dite cour le 13ème jour d'avril, de l'année de notre Seigneur, 1864.

Return.

Received, April 15th, 1864, and on the 16th day of the same month and year served copy of the within citation and accompanying petition on Menard & Vignaud, the defendants herein, by handing the same personally to Lucien Menard, one of the petitioners of said firm,
86 whom by interrogation I know to be such. Returned same day.
(Signed) ARTHUR HART,
D'y Sheriff.

Citations F & E.

State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Mr. JOSEPH MENARD:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

Witness the Honorable R. K. Howell, judge of the said court, the 13th day of April, in the year of our Lord 1864.
(Signed) A. MOREL,
D'y Clerk.

Etat de la Louisiane deuxième cour de district de la Nouvelle Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Mr. JOSEPH MENARD:

87 Vous êtes sommé de satisfaire à la demande contenue dans la pétition, dont une copie est ci-annexée ou de remettre votre réponse à icelle au bureau du greffier de la deuxième cour de district de la Nouvelle Orleans, dix jours après sa notification.

Temoin, l'honorable R. K. Howell, juge de la dite cour le 13ème jour d'avril de l'année de notre Seigneur 1864.

Return.

Received, April 15th, 1864, and on the 16th day of the same month and year, served a copy of the within citation and accompanying petition, on Joseph Menard, by leaving the same at his domicil, No. 198 Burgundy street, in the hands of Lucien Menard, a free person apparently over the age of fourteen years, living and residing in said domicil, and whose name, and other facts connected with this service I learned by interrogating him, said Joseph Menard being absent from home at the time of said service. Returned same day.

(Signed) ARTHUR HART,
D'y Sheriff

Exception.—Filed April 27th, 1864.

JOHN T. DELMAS
vs.
88 JOSEPH MENARD & MENARD & Vignaud. } No. 20441.

Second district court of New Orleans.

Now come Joseph Menard, acting in his own name and in the name of the firm of Menard & Vignaud, cited in the above-entitled suit, and respectfully represents that Lucien Menard, of this city, is a member of the aforesaid firm, and should have been made party to said suit, and that until this formality is complied with, this respondent is not bound to answer either in his own name or in behalf of said firm.

He therefore prays to be herein dismissed with costs.

(Signed) H. R. GRANDMONT,
Att'y for Def't.

Exception maintained.—Extract from the minutes, May 4th, 1864.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

The exception filed herein came on this day for trial—
R. J. Ker, esq., for plaintiff;
R. H. Grandmont, esq., for defendant, not present—
When after hearing pleadings and counsel,
89 It is ordered by the court that the exception be maintained with leave to plaintiff to ammend his petition.

Default.—Extract from the minutes, May 19th, 1864.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

On motion of R. J. Ker, esq., of counsel for plaintiff, and upon showing to the court that the defendants have failed to answer, though duly cited—

It is ordered that judgment by default be entered against them.

Answer.—Filed May 21st, 1864.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Second district court of New Orleans.

And now come into court the defendants by their undersigned counsel, who, for their answer to plaintiff's petition, deny all and singular the allegations therein contained.

And they therefore pray that the said plaintiff's demand be rejected with costs, and that there be judgment in their favor.

(Signed) H. R. GRANDMONT,
Of Counsel.

90 *Order and continuance—Extract from the minutes, Nov. 21st, 1864.*

JOHN T. DELMAS
vs.
J. MENARD & AL. } No. 20441.

This case, fixed for to-day, was ordered to be continued with preference, for want of time.

Order and continuance.—Extract from the minutes, December 5th, 1864.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

This case was called and continued indefinitely.

Supp'l petition.—Filed June 27th, 1865.

JOHN T. DELMAS
vs.
J. MENARD & AL. } No. 20441.

To the honorable the judge of the second district court of New Orleans:

The supplemental petition of John T. Delmas, who resides in N. O., respectfully sheweth:

That he has heretofore presented his petition to this honorable court demanding of Joseph Menard, Benoist O. Vignaud, and Lucien Menard to refund the amount paid by this petitioner to Joseph Menard (in advance) for 250,000 bricks, which said Menard bound himself to
91 deliver subsequently, and also demanding of said parties damages for the non-performance of their obligation to deliver said bricks, the contract for which was filed with the aforesaid original petition, shewing that therein said Joseph Menard obligated himself as principal, and that Menard & Vignaud became securities for Joseph Menard, and bound themselves in solido with him for the faithful performance of the said agreement.

That in writing said original petition, the attorney of this petitioner made several errors of calculation and of amount, in setting forth the sums due to this petitioner from said defendants, both as regards the

principal to be refunded and the amount of damages suffered by petitioner.

That the full price paid in advance by this petitioner for said bricks, was the sum of two thousand and sixty-two dollars and fifty cents, ($2,062 50,) and not two thousand six hundred and twenty-five dollars, ($2,625 00,) as erroneously set forth in said petition.

That the amount of damages suffered by this petitioner, from being deprived of his capital, from loss of time, and loss of profits, and
92 from great rise in the price of bricks, coupled with the failure of said defendants to comply with their contract, was and is the sum of two thousand five hundred dollars, ($2,500 00,) and not five hundred dollars, as by a clerical error is set forth in this petition.

That the total amount justly and legally due to this petitioner, for the causes above mentioned, and also set forth in the aforesaid original petition, is the sum of four thousand five hundred and sixty-two dollars and fifty cents; that said defendants have been regularly put in default, according to law, for failing to deliver said bricks to this petitioner, as they were bound to do.

Wherefore petitioner prays leave to file and enter his supplemental petition; and that Joseph Menard, Benoist O. Vignaud, and Lucien Menard, all residing in New Orleans, be cited to answer thereto, and that, after due proceedings, *the* be condemned to pay unto this petitioner the sum of four thousand five hundred and sixty-two dollars and fifty cents, with interest, and costs of suit.

Petitioner further prays for general relief, and, as in duty bound, shall ever pray, &c.

93 (Signed) R. J. KER,
Att'y for Pet'r.

Order.

Let this supplemental petition be filed.

New Orleans, June 27th, 1865.

(Signed) JOHN W. THOMAS,
Judge.

Citation.

State of Louisana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Mr. LUCIEN MENARD, of New Orleans:

You are summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of New Orleans in ten days after the service hereof.

Witness the Honorable John W. Thomas, judge of the said court, the 27 day of June, in the year of our Lord 1865.

(Signed) A. J. VILLERÉ
D'y Clerk.

Return.

94 Received, June 29th, 1865, and on the same day, month, and year, served copy of the within citation and accompanying petition personally on Lucien Menard, one of the defendants herein. Returned same day.

(Signed) G. TOUMADE,
D'y Sheriff.

Citation.

State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Mr. BENOIST O. VIGNAUD, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of New Orleans in ten days after the service hereof.

Witness the Honorable John W. Thomas, judge of the said court, the 27th day of June, in the year of our Lord 1865.

(Signed) A. J. VILLERÉ,
D'y Clerk.

Return.

95 Received, June 29th, 1865, and on the same day and month and year, served copy of the within citation and accompanying petition on Benoist O. Vignaud, by leaving the same at his domicil, Burgundy street, between Dumaine and St. Anne, in the hands of F. Vignaud, his son, a free person, apparently over the age of fourteen years, living and residing in said domicil, and whose name, together with other facts connected with this service I learned by interrogating him, and he informed me that Benoist Vignaud, the defendant herein, was very ill at the time of this service. Returned same day.

(Signed) G. TOUMADE,
D'y Sheriff.

Citation.

State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Mr. JOSEPH MENARD, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of New Orleans, in ten days after the service hereof.

96 Witness the Honorable John W. Thomas, judge of the said court, the 27 day of June, in the year of our Lord 1865.

(Signed) A. J. VILLERÉ,
D'y Clerk.

Return.

Received, June 29th, 1865, and on the 5th July, 1865, served copy of the within citation and accompanying petition on Joseph Menard, by leaving the same at his domicil on Burgundy street, between Maine and St. Anne streets, in the hands of Lucien Menard, his brother, a free person, apparently over the age of fourteen years, living and residing in the said domicil, and whose name, together with other facts connected with this service, I learned by interrogating him, Joseph Menard, the defendant herein, being absent at the time of this service.

Returned same day.

(Signed) G. TOUMADE,
D'y Sheriff.

Supp'l answer.—Filed July 18th, 1865.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Second district court of New Orleans.

97 And now come Benoist O. Vignaud and L. Menard, of the firm of Menard & Vignaud, and for further and supplemental answer to the plaintiff's original and supplemental petitioners, respectfully says:

That the name of said firm of Menard & Vignaud has, without authority, been used by the aforesaid Joseph Menard in the transaction mentioned in the said petitions; that the said transaction was out of the ordinary line or sphere of business of said firm, and that these respondents, as members of said firm, are by no means bound by the acts of said Joseph Menard.

Respondent further excepts to the supplemental petition herein filed, on the ground that the object of it is different from the main action.

Wherefore these respondents pray to be herein dismissed, with costs and general relief.

(Signed) H. R. GRANDMONT,
Att'y for Resp'ts.

Order.

Let this supplemental answer be filed.

New Orleans, July 18th, 1865.

(Signed) E. ABELL,
Judge of the 1st District Court,
acting during the absence of Judge of the 2nd District Court.

98 *Default set aside.—Extract from the minutes, July 21st, 1865.*

JOHN T. DELMAS
vs.
J. MENARD & AL. } No. 20441.

On motion of R. H. Grandmont, attorney for Joseph Menard, the judgment by default herein rendered against him on Thursday, July 20th, 1865, is hereby set aside, and leave of court being had and ob-

tained, said Joseph Menard now files herein his separate answer to the petition of plaintiff.

Separate answer.—Filed July 21st, 1865.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD, IN solido. } No. 20441.

Joseph Menard, one of the defendants in this case, for his separate answer to the petitions herein filed against him, denies all and singular the allegations therein contained, and specially the right claimed by plaintiff to amend his original petition, and he prays to be herein dismissed, with costs, and for general relief.

(Signed) H. R. GRANDMONT,
Att'y for Def't.

99 *Affidavit.—Filed November 17th, 1865.*

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

Second district court of New Orleans.

JOHN T. DELMAS, being duly sworn, says:

William Bobb, who resides in the parish of Jefferson, is a material witness to establish affiant's demand in this case, and that a commission addressed to any judge or justice of the peace of said parish is necessary to procure his testimony.

(Signed) J. T. DELMAS.

Sworn to and subscribed before me this the 16th day of November, 1865.

(Signed) SAMUEL NUPES,
2nd Justice of the Peace, Parish of Orleans.

Order for commission.—Filed November 17th, 1865.

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

On motion of T. Wharton Collens, esqr., of counsel for plaintiff, and on filing plaintiff's affidavit, it is ordered that a commission do issue herein, directed to any judge or justice of the peace in the parish of Jefferson, to take the testimony of William Bobb.

100 *Order & continuance.—Extract from the minutes, November 28th, 1865.*

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

By consent of parties in open court, this case, fixed for to-day, was continued by preference.

Order & continuance.—Extract from the minutes, December 12th, 1865.

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

By consent of parties in open court, it is ordered that this case be continued by preference.

Order & continuance.—Extract from the minutes, January 9th, 1866.

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

On motion, and by consent of counsel, it is ordered that this case be continued by preference.

Order & continuance.—Extract from the minutes, January 23d, 1866.

JOHN T. DELMAS
vs.
MENARD & VIGNAUD. } No. 20441.

101 By consent of parties in open court, it is ordered that this case be continued by preference.

Motion for subpœna, duces tecum.—Filed February 16th, 1866.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Second district court.

On motion of T. Wharton Collens, of counsel for plaintiff—
It is ordered by the court that a subpœna, duces tecum, do issue in this case, commanding the defendant, Jos. Menard, defendant herein, to bring into court, on the trial of this case, on Monday, 19th February, 1866, at 12 o'clock, m., the original contract between him and plaintiff, dated 3d March, 1862, whereby he contracted to deliver to plaintiff 250,000 bricks, at $8 25 per thousand, and that on his failure to comply with this order, that he do show cause why the copy made by Madden, notary, should not be read in evidence. (Extract from the minutes.)
(Signed) JULIEN MICHEL,
D'y Clerk.

Return.

Received, February 16th, 1866, and on the 17th day of same
102 month and year served copy of the within order of court on Mrs. Jos. Menard, by leaving the same at his domicil, No. 198 Burgundy street, in the hands of Misses Menard, a person apparently over the age or fourteen years, living and residing in said domicil, Jos. Menard being absent at the time of said service. Returned same day.
(Signed) JNO. O. LOZE,
D'y Sheriff.

Order renewing S. D. T.—Filed March 2nd, 1866.

JOHN T. DELMAS
vs.
MENARD & VIGNAUD & AL. } No. 20441.

On motion of T. Wharton Collens, esq., of counsel for pl'ff—
It is ordered by the court that the subpœna, duces tecum, heretofore issued herein to Menard be renewed and made returnable on the trial of this case, to wit, on Monday, 5th March, 1866. (Extract from the minutes.)

(Signed) JULIEN MICHEL,
Dy Clerk.

Return.

Received, March 2nd, 1866, and on the 3rd day of same month and year, served copy of the within motion on Joseph Menard, one of the defendants, personally. Returned same day.

103 (Signed) JNO. O. LOZE,
Dy Sheriff.

Commission.—Filed March 5th, 1866.

The State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

To any judge or justice of the peace of the parish of Jefferson, greeting:

Know ye that we, reposing confidence in your prudence and fidelity, do by these presents give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as for the defendant, in a certain suit now pending in our said court, in the case of John T. Delmas vs. Joseph Menard and Menard & Vignaud. Witness, William Bobb.

Therefore we desire you, that, at certain times and places by you to be appointed for that purpose, you cause the said witnesses to come before you; that you then and there examine them apart upon their respective corporal oaths, first taken before you upon the Holy Evangelists; that you reduce their examination to writing; and when

104 you shall so have taken them, that you send the same with this commission, closed up under your seal, to us, in our said court, at the city of New Orleans, without delay.

Witness the Honorable John W. Thomas, judge of the second district court of New Orleans, this 22nd day of November, in the year of our Lord 1865, and in the 90th year of the independence of the United States.

(Signed) A. J. VILLERÉ,
Dy Clerk.

Interrogatories.—Filed March 5th, 1866.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Second district court.

Interrogatories filed under and by virtue of the commission herein issued to any judge or justice of the peace of the parish of Jefferson to take the testimony of William Bobb.

1st interrogatory. Where do you reside?

2nd interrogatory. What business do you follow, and how long have you been carrying it on, and where?

3rd interrogatory. Do you not know what has been the price
105 of bricks in the New Orleans market for the last three (3) years; and what business have you been carrying on to enable you to know the price?

4th interrogatory. What was the price of V. Chopsin's first quality building bricks, or of the equal quality of other makers on the 30th of July, 1862; on the 30th of March, 1863; on the 13th of April, 1864; on the 23d of June, 1865, and at the present time?

5th interrogatory. Has the market price of the quality of bricks mentioned ever been as low as eight dollars and twenty-five cents per thousand ($8 25 p'r 1,000) or lower, since the 30th of July, 1862, and whether the increase of price, if any, has been progressive or otherwise?

6th interrogatory. What additional charge, if any, over the market price would it cost to have the brick delivered on a lot corner of Roman and Esplanade streets, in New Orleans?

(Signed) T. WHARTON COLLENS, *Att'y.*

No cross-examination.

(Signed) H. R. GRANDMONT,
Att'y for Def't.

106 *Answer to interrogatories.*

THE STATE OF LOUISIANA,
Parish of Jefferson, (R. B.:)

In justice's court, Gretna.

JOHN F. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

In answer to interrogatories filed under and by virtue of the commission issued to any judge or justice of the peace of the parish of Jefferson, to take the testimony of William Bobb.

In answer to interrogatory first; I reside in the parish of Jefferson, (R. B.) La.

2nd. In the State of Louisiana for the last 20 years, and in the parish of Jefferson (right bank) for the past 15 years, and by occupation a brick-maker, and also a maker of lumber.

3rd. By referring to the 4th interrogatory, the price will be found at the periods mentioned. I do not know the value of Chopin's bricks.

4th. In answer, will say, by referring to my books, I find that I sold a good quality of building brick on the 30th July, 1862, at ten dollars ($10 00) per thousand; in March, 1863, on the 30th, I sold brick
107 (good quality) at eight dollars and fifty cents ($8 50) per thousand; on the 22nd April, 1864, I sold the same quality of brick at eleven dollars ($11 00) per thousand; in the month of June, 1865, I made no sales and consequently cannot state the price; and at the present time I am selling brick (good quality) at eighteen ($18 00) dollars per thousand.

5th. I have stated the lowest price I have sold brick at since July, 1862, was $8 50 per thousand.

6th. I have paid for hauling, over the market price, the following: At any point above Canal street, two dollars per thousand, and three dollars per thousand when delivered at any point between Canal street and Esplanade street.

(Signed) WILLIAM BOBB.

Sworn to & subscribed this 24th day of November, 1865.

(Signed) W. M. NAUDAIN, *J. P.*

Plea of prescription.—Filed March 5th, 1866.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

The defendants, by their undersigned counsel, and for peremp-
108 tory exception, pleads the prescription of one year to the plaintiff's action, and therefore prays that judgment be rendered maintaining the said plea of prescription, and rejecting the plaintiff's demand, with costs.

(Signed) H. R. GRANDMONT,
Att'y for Def'ts.

Note of evidence & testimony.—Filed March 5th, 1866.

JOHN T. DELMAS
vs.
JOSEPH MENARD & AL. } No. 20441.

Second district court. Note of evidence & testimony for plaintiff.

Offered certificate of delivery of act 23 June, 1865, between Joseph Menard & crd., filed now in evidence, and marked A.

JOHN COLLENS sworn, says:

Has resided in New Orleans a long time; is a builder for 40-odd years, and 20 years in N. O.; has not bought any (except a few thousand) since three years. As I was not building, I was not very well acquainted with the price of bricks, and have not been since 3 years. In March, 1863, bricks were worth from $7 75 to $8 25 a thousand;
109 there *were* not much doing then; they are much higher now—worth $18 00 a M., according to kiln, distance, &c. In June last year they were worth from $16 00 to $17 00, and perhaps $18 00; they vary now and varied then.

Cross-examination:

I was not buying. Am not positive of the prices above stated; general impression, though.

Testimony of William Bobb, now filed & introduced.

JOHN E. HYDE sworn, says:

Knows Joseph and Lucien Menard and B. O. Vignaud, def'ts. Has never seen Mr. Vignaud, but saw both of the Menards. Joseph and Lucien were and are partners of the firm of Menard & Vignaud. Has applied to Menards for the contracts. I called several times on Joseph Menard after that, but he was absent. Called on him again at his return last fall. I applied to him for a compliance with the contract. His answer was that he was not in a situation to comply with *him*. I had several interviews with Lucien, who is one of them. Stated that the bricks were ready in the brick-yard of Mr. Choppin, and that he had not means to transport them; and he moreover admitted that the whole contract was right, and should be complied with. I ap-
110 plied to Lucien as a member of the firm of Menard & Vignaud, and at their office.

Cross-examination:

I called on the firm 6 or 7 times, but saw Joseph Menard but once, before his departure, about said contract. The first time I called was on the date that the contract was continued from the 30th July, 1862, and after that did not see Joseph Menard until his return, but saw Lucien. I called on them after the expiration of the 8 months, 5 or 6 times. Delmas was very anxious to get the bricks, and I called on them to try and get the bricks. At that time the means of transportation from Mr. Choppin's brickyard were rather difficult, from the war; but Mr. Menard said that if he had the money he could have them transported, and wanted Mr. Delmas to advance the money so to do. That was Lucien Menard. It is not to my knowledge that the railroad built by Mr. Choppin, from his brickyard to the Carrolton Railroad track, was destroyed by the federal forces.

In chief:

Has been to Carrolton. There is a road on the levee—a road from here to Carrolton.

For defendants.

111 PAUL CHOPPIN, sworn in his voir dire, says:

Is not interested in this case. I have sold the bricks to Mr. Menard. I was bound to deliver them at Tivoli Circle. I did not deliver them. If a judgment was rendered against Menard, I would not be responsible, because to deliver them was impossible. If it has been possible to deliver them, I might, I suppose, be responsible; I don't know.

Cross-examination and voir dire:

I gave the bricks in payment of a debt, under contracts to pay him for money owed him. He has some claims against me. It is not a claim arising from the contract upon which this suit is built. Has no interest whatever in the result of this suit, except selling the bricks to Mr. Menard to pay debts.

Protest A.—Filed March 5th, 1866.

STATE OF LOUISIANA,
Parish & City of New Orleans:

Be it known that, on this 23d day of June, in the year of our Lord one thousand eight hundred and sixty-five, I, Hugh Madden, a notary public in for the parish & city of New Orleans, State of Lou-
112 isiana, aforesaid, duly commissioned and qualified, did, at the request of J T. Delmas, esq., of this city, proceeded to the residence of Mr. Joseph Menard, situate at No. 198 Burgundy street, in the second district of this city, and there, in the presence of John Edwards and William Aarmour Cromwell, competent witnesses, of lawful age, domiciliated in this city, present to said Joseph Menard a certain original contract, bearing date New Orleans, March 3rd, 1862, signed by said Joseph Menard, Menard & Vignaud, and J. T. Delmas, a true copy of which is below written, and demanded of him, said Menard, a compliance with, and fulfillment of, said contract, and was by him answered that he admitted his signature thereto was genuine, but that he would not comply with same, because he was not in a condition to do so now; that he had been absent from this city, & was not in a condition to deliver the bricks in any manner.

The said original contract is in the words & figures following, to wit:

"NEW ORLEANS, *March 3rd*, 1862.

"Joseph Menard hereby agrees to sell and deliver to John T. Delmas two hundred and fifty thousand (say 250,000) of the first quality
113 of V. Choppin's building bricks, at the price of eight dollars and twenty-five cents ($8 25) per thousand, which price has been paid in full by the purchaser at the time of the signing thereof, and the said payment is hereby acknowledged. Joseph Menard agrees to make full and complete delivery of the said bricks within four (4) months of the date of this agreement, and to place the same on a lot of ground owned by Mr. Vignaud, his partner, on Esplanade street, between Prieur and Roman streets, in the city of New Orleans, and adjoining the property lately owned by Hughes Pedesclaux, esqr., and purchased from him by John T. Delmas.

"Joseph Menard agrees to have the bricks well piled upon said lot of ground in such manner that the same can be readily counted and the number ascertained. John T. Delmas is to have the use of the said lot of ground free of all rent until he shall be required by Joseph Menard to deliver up possession of the same, which he, the said Delmas, binds himself to do within fifteen days after demand shall be made upon him for such delivery.

"Menard & Vignaud become sureties for Joseph Menard here-
114 in, and bind themselves in solido with him for his performance of the above and foregoing agreement.

(Signed) "JOSEPH MENARD.

"By mutual agreement the time of delivery of the within contract is extended eight months from the 30th July, 1862.

(Signed) "JOSEPH MENARD.
" "MENARD & VIGNAUD.
" "JOHN T. DELMAS."

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against

the said Joseph Menard as against all others whom it doth or may concern, for all damages, costs, charges, and injuries suffered or to be suffered by reason of the non-compliance with, and fulfilment of, said contract by said Joseph Menard.

A United States internal revenue stamp for twenty-five cents has been affixed hereto, duly cancelled.

In faith whereof I hereunto subscribe my name, together with said witnesses, on the day and date aforesaid.

(Signed original) JOHN EDWARDS.
WILLIAM A. CROMWELL.
HUGH MADDEN, *Not. Pub.*

115 A true copy.
(Signed) HUGH MADDEN,
Not. Pub.

Judgment.—Filed March 5th, 1866.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

This case came on this day for trial by called assignment—
T. W. Colleus for plaintiff,
R. H. Grandmont for defendants—
When, after pleadings and evidence, as also testimony and argument of counsel for plaintiff, the same being submitted by counsel for defendants—

It is ordered, adjudged, and decreed that plaintiff, John T. Delmas, have judgment in his favor and recover of defendants, Joseph Menard and Menard & Vignaud, in solido, (commercial firm of Menard & Vignaud, composed of Joseph Menard, Lucien Menard, and Benoist O. Vignaud,) the sum of four thousand five hundred and sixty dollars and 50 cents, with interest from judicial demand at the rate of 5% per annum and costs of suit.

Judgment rendered March 5th, 1866.
Judgment signed March 19th, 1866.
(Signed) J. W. THOMAS, *Judge.*

116 *Rule for a new trial.—Filed March 8th, 1866.*

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

On motion of R. R. Grandmont, of counsel for the defendants—

It is ordered that John T. Delmas, the plaintiff, do show cause on Thursday, the 15th instant, at 11 o'clock a. m., why a new trial should not be granted to the said defendants on the following specific grounds:

1st. That the testimony of P. Chopin, a witness called to the stand on behalf of the said defendants, was improperly rejected by the court on the score of interest; that the said witness was in every respect competent in the cause; and that, had he been permitted to give his testimony, he should have established that the defendants were prevented by circumstances beyond their control from complying with the con-

tract declared upon by plaintiff, and that consequently they were not liable in damages to said plaintiff for the alleged breach of said contract.

2d. That the testimony upon which the plaintiff relies in the
117 cause was insufficient in law to warrant the judgment rendered by the court.

3d. That the plea of prescription filed by defendants has been improperly disregarded by the court.

4th. And, finally, that the said judgment is also in other respects contrary to law and evidence. (Extract from the minutes.)

(Signed) JULIEN MICHEL,
Dy Clerk.

Return to rule.

Received, March 8th, 1866, and on the same day, month, and year, served copy of the within rul' or motion on T. W. Collens, esq., attorney for plaintiff, who accepted service thereof. Returned same day.

(Signed) JOHN O. LOZE,
Dy Sheriff.

Rule continued.—Extract from the minutes, March 15th, 1866.

JOHN T. DELMAS
vs. } No. 20441.
JOSEPH MENARD & MENARD & VIGNAUD.

The rule herein filed for a new trial came on this day—

H. R. Grandmont for plaintiff in rule; T. W. Collens for defendant in same—
118 When, after pleadings and argument of counsel, heard and begun,

It is ordered that the same be continued to to-morrow morning, at 11 o'clock, a. m.

Rule under advisement.—Extract from the minutes, March 17th, 1866.

JOHN T. DELMAS
vs. } No. 20441.
JOSEPH MENARD & MENARD & VIGNAUD.

After argument by counsel, the rule for a new trial herein is taken under advisement by the court.

New trial refused.—Extract from the minutes, March 19th, 1866.

JOHN T. DELMAS
vs. } No. 20441.
JOSEPH MENARD & MENARD & VIGNAUD.

For the reasons assigned orally by the court—

It is ordered that the rule herein filed for a new trial be dismissed, and the new trial refused.

Petition of garnishee.—Filed August 3rd, 1867.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

To the honorable the judge of the second district court of New Orleans:

The supplemental petition of John T. Delmas respectfully sheweth—

119 That, upon the judgment obtained in this case for the sum of four thousand five hundred and sixty dollars and fifty cents, with interest at five per cent. from 13th April, 1864, and costs of suit, amounting to one hundred dollars, against Joseph Menard, petitioner, has issued a writ of execution; and having reason to believe that John Henderson, a third person, is indebted unto the said defendant in execution, or has property or effects in possession or under control belonging to said debtor, petitioner has caused the seizure to be made in the hands of said third person.

Therefore petitioner prays that said John Henderson be cited and ordered to answer, under oath, the annexed interrogatories, and, after due proceedings, condemned to pay the amount of said judgment and costs.

(Signed) COLLENS & WOOLDRIDGE,
Of Counsel.

Interrogatories.

1st. Had you in your hands or under your control, directly or indirectly, at the time of the service of notice of seizure in this case, or since, or at the time of service of these interrogatories, any money,
120 rights, credits, or other property whatsoever, directly or indirectly belonging or due to the said defendant in execution, or in which he has or had any direct or indirect interest for the whole, or for a part, or otherwise; and if yea, what is the nature, description, and amount thereof, and is the same not sufficient to pay or satisfy the full amount of said judgment and costs; or, if less, to what amount? you being asked and required to make a full disclosure in relation to the same.

2nd interrogatory. Were you not, at the time of service of notice of seizure upon you in this case, or since then, or at the time of service of these interrogatories, or since, or at the time of answering the same, directly or indirectly indebted, or obligated unto the said defendant in execution for anything, or for any sum whatever, whether for yourself alone, or together with others, in consequence of any sale, or exchange, or transfer, or assignment, or payment, or novation, or compensation, or *luting*, or hireing, or service, or labor, or employment, or affreightment, or insurance, or job, or work, or rent, or interest, or partnership, or
121 loan, or deposit, or trust, or bailment, or agency, or suretyship, or compromise, or pledge, or in consequence of any contract or obligation whatever, whether the same be due or to become due, and whether the interest of said defendant in execution be direct or indirect, or be for the whole or for a part only, or whether it be by bill, note, or otherwise; and if yea, what is the nature, description, and amount thereof, and is the same not sufficient to pay or satisfy the full amount of said judgment and costs, or, if less, what amount? you being asked and required to make a full and detailed disclosure in relation to the same.

3rd interrogatory. Have you at any time since the service of notice

of seizure in your hands herein, made, directly or indirectly, unto or with the said defendant in execution, any payment or motion, or compromise, or arrangement, or given him any note or other written obligation, or received from him, directly or indirectly, any receipt or acquittance, or received or acquired against him, directly or indirectly, any compensation, or set-off, or demand, or note, or other obligation or right of action? and if yea, state the nature, description, and
122 amount thereof, and the time, place, and circumstances of the same.

4th interrogatory. Did you not purchase at sheriff's sale, on 1st July, 1867, in the case of Mr. & Mrs. Bressole Gibert vs. Joseph Menard, No. 17746 of the 5th district court, a certain property seized therein, as the property of Joseph Menard, and after satisfying the judgment and execution by payment of part of the price to the sheriff, was there not a surplus on account of the price of said property remaining in your hands; if yea, what is the amount of said surplus or remainder due on said price; is it not six thousand dollars?

(Signed) COLLENS & WOOLDRIDGE,
Of Counsel.

Order of court.

Let John Henderson be made garnishee herein, and ordered to answer under oath, and within the legal delays, the foregoing interrogatories, to him propounded.

New Orleans, August 3d, 1867.

(Signed) J. W. THOMAS,
Judge.

Citation of garnishee.

123 State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

The State of Louisiana to John Henderson of New Orleans:

You are hereby cited to declare, on oath, what property belonging to the defendant in this case you have in your possession, or in what sum you are indebted to said defendant; and also to answer in writing, under oath, the interrogatories annexed to the petition, of which a copy accompanies this citation, within ten days after the service thereof; otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable J. W. Thomas, judge of the said court, this 3rd day of August, in the year of our Lord 1867.

(Signed) A. J. VILLERÉ,
Dy Clerk.

Return.

Received, August 3rd, 1867, and on the 6th day of August, 1867, I served a copy of the within citation, together with the accompany-
124 ing petition, interrogatories, and order on John Henderson, esq'r, garnishee herein, personally. Returned same day.

(Signed) B. ALBERT,
Dy Sheriff.

Fi. Fa.

State of Louisiana, second district court of New Orleans.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

Parish of Orleans, the State of Louisiana, to the sheriff of the parish of Orleans, greeting:

We command you that by seizure and sale of the property, real and personal, rights, and credits of Joseph Menard and Menard & Vignaud, in the manner prescribed by law, you cause to be made the sum of four thousand five hundred and sixty dollars and fifty cents, with 5 % per annum interest on said sum from 13th April, 1864, until paid; and also the sum of sixty-three $\frac{75}{100}$ dollars costs, as well as your own costs and charges, to satisfy a judgment rendered against the said Joseph Menard and Menard & Vignaud, in our second district court of New Orleans, on the 5th day of March, 1866, in favor of John
125 T. Delmas; and how you shall have executed this writ, you make return to our said court (in seventy days) according to law.

Witness the Honorable J. W. Thomas, judge of the said court this 2nd day of August, in the year of our Lord 1867.

(Signed) A. J. VILLERÉ,
D'y Clerk.

Notice of garnishee annexed to Fi. Fa.

NEW ORLEANS, *August 3rd*, 1867.

STATE OF LOUISIANA,
Sheriff's Office, Parish of Orleans.

In the second district court of New Orleans.

To JOHN HENDERSON, Esq'r., garnishee:

Please to take notice that by virtue of a writ of fieri facias, issued in the above-mentioned suit, I seize, in your hands, all the goods, chattles, lands, tenements, rights, and credits, monies, effects, bills of exchange, promissory notes, or property of any kind which you now or hereafter have in your possession, or under your control, belonging to the defendant, and more particularly any sum remaining after paying Mr. & Mrs. Gibert, only, on account of the price of the property bought by
126 you at sheriff's sale in the case of Gibert vs. Menard, No. 17746 of the docket of the 5th court, which you will hand over to me.

(Signed) S. M. BURNETT,
D'y Sheriff.

Return to notice of garnishee.

On the 6th day of August, 1867, I served a copy of the within notice of garnishee on John Henderson, esq., in person.

(Signed) B. ALBERT,
D'y Sheriff.

Return to Fi Fa.

Received, August 2nd, 1867, and by virtue of within instructions from plaintiff's attorney, made general seizure in the hands of John Henderson, garnishee, seizing specially in his hands any sum remaining after paying Mr. & Mrs. Gibert, only, on account of the price of property bought by him at sheriff's sale in the case of Gibert vs. Menard, No. 17746 of the docket of the 5th district court, as will appear from the annexed notice of seizure, and the return thereon, which are made part hereof. From said general seizure nothing has as yet come into the possession of the sheriff, but this writ being about to expire I now make this my return, and request the clerk of this honorable court to
127 furnish me with a copy of this writ, together with my proceedings therein, conformally to law. No other property found, after due demand made of defendant, Joseph Menard, and of plaintiff's atty's. No demand could be made of the codefendant Vignaud, he being, as I am credibly informed, absent from the State. Returned October 10th, 1867.

(Signed) S. M. BURNETT,
D'y Sheriff.

Answer of garnishee.—Filed August 15th, 1867.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD AND VIGNAUD. } No. 20441.

The answer of Jno. Henderson, made garnishee in the above-entitled suit, to the interrogatories propounded to him:

To the first interrogatory, No.
To the second " No.
To the third " No.
To the fourth " On the 1st of July, 1867, I did purchase at sheriff's sale in the case of Mr. & Mrs. B. Gibert vs. Jos. Menard, No. 17746, of the 5th district court of New Orleans, certain property for the price of ($5,625) five thousand six hundred and twenty-five
128 dollars, of which I paid in the hands of said sheriff the sum of ($2,125 93) five thousand one hundred and twenty-five dollars and ninety-three cents, amount of plaintiff's claim, which was the first anterior and preferable claim secured by mortgage and vendor's privilege, and of the costs, charges, taxes, &c.; the balance, viz, ($3,499 07,) three thousand four hundred and ninety-nine dollars and seven cents, I retained in my hands, to be applied, according to law, to the payment of the subsequent mortgages, as enumerated in the mortgage certificate read at the sale and recited in the deed which I received from said sheriff, said mortgages being the following: A conventional or special mortgage in favor of the Merchants' Insurance Company for $10,000, recorded May 29th, 1857, and reinscribed June 25th, 1867; and judicial mortgages, to wit, in favor of R. H. Bailey for $2,500, recorded December 18th, 1865; in favor of John T. Delmas for $4,560, recorded March 24th, 1866; in favor of C. H. Kernion for $3,750, recorded May 11th, 1866; in favor of Ed. Dupasseur for $9,800, recorded May 18th, 1866; in favor of P. Poutz for $2,000, recorded December 11th,
129 1866. On the 6th of August, 1867, I received from the sheriff notice of a demand by the Merchants' Mutual Insurance Company for payment of the sum of $5,000, with interest, &c., alleged

to be secured by mortgage upon the property purchased by me, and a copy of petition and order of seizure and sale issued by the 5th district court of New Orleans, No. 18212, for the seizure and sale of said property to satisfy said demand. The execution of this order I have enjoined and called all the above-enumerated *and called all the above-enumerated* judicial mortage creditors, together with the said Merchants' Mutual Insurance Company, and the defendant, Joseph Menard, to come before the said 5th district court of New Orleans, and discuss their rights to the aforesaid balance of $3,499 07, in my hands, as aforesaid, so that I may safely pay the same to whoever was adjudged to be entitled thereto, and have the property purchased by me release' from all said mortgages. I therefore hold said balance subject to the final decision of the proper court or courts in said matter.

(Signed) JOHN HENDERSON.

130 Sworn to & subscribed before me this 15th August, 1867.

(Signed) A. J. VILLERÉ,
D'y Clerk.

Rule.—Filed November 8th, 1867.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

On motion of Collens & Wooldridge, esq'rs, of counsel for the plaintiff, and on suggesting to the court that John Henderson, made garnishee under the execution herein, has, in answer to the interrogatories propounded to him, confessed that he has in his possession the sum of three thousand four hundred and ninety-nine $\frac{07}{100}$ dollars belonging to the defendant Joseph Menard,

It is ordered by the court that the said Henderson do show cause, within ten days from service of this motion, why he should not be ordered to pay said sum to the sheriff, according to law, or in default thereof judgment and execution should not be granted against him for said amount.

Return to rule.

Received, November 8th, 1867, and on the 11th day of same month and year, I served a copy of the within rule on John Henderson
131 personally. Returned same day.

(Signed) ALLEN J. SHENNELL,
D'y Sheriff.

Answer to rule.—Filed November 21st, 1867.

JOHN T. DELMAS
vs.
JOSEPH MENARD & MENARD & VIGNAUD. } No. 20441.

John Henderson, made garnishee in the above-entitled suit, in answer to the rule herein on the 8th, and served upon him on the 11th, of November, 1867, says:

That he denies having confessed having in his possession any sum belonging to the defendant, Joseph Menard, as will appear by his

answers to interrogatories served upon him, which are not and cannot be controverted; he expressly denies the right of the plaintiff in rule, any more than the defendant Joseph Menard could, to compel your respondent to bring into this court the sum in respondent's hands as disclosed by his said answers, inasmuch as said sum is held by your respondent subject to the mortgages mentioned in his said answers, one of which is a special mortgage, and your respondent should not and cannot be made to pay the said sum without at the same time having his property released from said mortgages; he reiterates
132 all the facts stated in his said answers and especially that the rights of the several parties holding or claiming said mortgages are being litigated in the 5th district court of New Orleans.

Wherefore respondent prays that said rule be dismissed with costs, and for general relief.

(Signed) P. CHAS. CUVELLIER, *Att'y.*

Certificate of the recorder of mortgages, offered in evidence by Delmas.—Filed May 4th, 1868.

State of Louisiana, second district court of New Orleans.—Judgment rendered March 5th, 1866, and signed March 19th, 1866.

JOHN T. DELMAS
vs. } No. 20441.
JOSEPH MENARD, & MENARD & VIGNAUD.

It is adjudged, ordered, and decreed, that plaintiff, J. T. Delmas, have judgment in his favor, and recover of defendants Joseph Menard, and Menard & Vignaud in solido, commercial firm of Menard & Vignaud, composed of Joseph Menard, Lucien Menard, and Benoist O. Vignaud, the sum of four thousand and sixty $\frac{50}{100}$ dollars with interest from judicial demand, at the rate of 5 % per annum, and costs of suit.

133 New Orleans, March 24th, 1866.

(Signed) CHAS. E. LEWIS,
D'y Recorder.

I, the undersigned, deputy recorder of mortgages in and for this city and parish of Orleans, State of Louisiana, do hereby certify that the above is a true copy of the original, recorded in this office in book J 11, folio 635.

New Orleans, March 27th, 1868.

[SEAL] (Signed) A. DUCATEL, JR.,
D'y Recorder.

Letter marked A, offered in evidence by def't.—Filed May 4th, 1868.

NEW ORLEANS, *13th July*, 1866.

Mr. JOHN HENDERSON, *New Orleans.*

DEAR SIR: The Merchants' Insurance Company hold a note secured by special mortgage on the property which you purchased at sheriff's sale at the suit of Gibert vs. Menard. The special mortgage in question was registered twice, the first time on the 28th May, 1857, the second time on the 19th June, 1867.

134 All previous mortgages have been satisfied, and of subsequent mortgages the only special mortgage is the foregoing one, the others being judicial mortgages.

Under the article 707 of the code of practice the purchaser is required to pay to the special mortgages, and not to judicial mortgages. Your refusal to pay the proceeds to the Merchants' Ins. Co. makes it necessary that I should resort to an order of seizure and sale under C. P., art. 709, as our mortgage contains fact de non alienando. This we will do if we do not hear from you before noon on Monday next.

I remain, very respectfully, your ob't serv't,

(Signed) A. & M. VOORHIES,
Att'ys of Mer. Ins. Co.

Contract offered in evidence by Delmas.—Filed May 4th, 1868.

NEW ORLEANS, *March 3rd*, 1862.

Joseph Menard hereby agrees to sell and deliver to John T. Delmas two hundred and fifty thousand (say 250,000) of the first quality of V. Chopin's building bricks, at the price of eight dollars and twenty-five
135 cents ($8 25) per thousand, which price has been paid in full by the purchaser, at the time of signing hereof, and the said payment is hereby acknowledged. Joseph Menard agrees to make full and complete delivery of the said bricks within four (4) months of the date of this agreement, and to place the same on a lot of ground owned by Mr. Vignaud, his partner, on Esplanade street, between Prieur and Roman streets in the city of New Orleans, and adjoining the property lately owned by Hughes Pedesclaux, esq., and purchased from him by John T. Delmas.

Joseph Menard agrees to have the bricks well piled upon said lot of ground, in such manner that the same can be readily counted and the number ascertained. John T. Delmas is to have the use of the said lot of ground free of all rent, until he shall be required by Joseph Menard to deliver up possession of the same, which he, the said Delmas, binds himself to do within fifteen days after demand shall be made upon him for such delivery.

Menard & Vignaud becomes securities for Joseph Menard here-
136 in, and bind themselves in solido with him for his performance of the above and foregoing agreement.

(Signed) JOSEPH MENARD.

By mutual agreement the time of delivery of the within contract, is extended eight months from the 30th of July, 1862.

(Signed) JOSEPH MENARD.
" MENARD & VIGNAUD.
" JOHN T. DELMAS.

Mortgage certificate, offered in evidence by pl'ff.—Filed May 4th, 1868.

OFFICE OF MORTGAGES.

The undersigned, recorder of mortgages for the parish of Orleans, city of New Orleans, State of Louisiana, certifies that, in the records of this office there are no other mortgages standing in the name of Joseph Menard and recorded against the following property, viz:

A lot of ground with the improvements thereon, situated in the first district of this city, in the square bounded by Tchoupitoulas, Girod, Lafayette, and Foucher streets and having in American measure 20 feet 1½ inch front on Tchoupitoulas street, 28 feet 6 inches front on said Foucher street, by 139 feet 7 inches and 2 lines in depth and
137 front on Lafayette street, and 139 feet 4 inches and 5 lines in

depth on the line towards Girod street, which divides it from the property of the estate of the late A. Philips, the whole according to a plan drawn by Hugh Grant, late surveyor, and deposited under the No. 84 in the office of F. Grima, late notary public in this city, than the following, to wit:

B. 69, f. 676. The one he granted in favor of Mrs. Bressole Gibert, per act before Theo. Guyol. notary public, dated 19th May, 1867, to secure $4,875 00, interest and costs as per said act, recorded 21st May, 1857, and reinscribed in B. 82, folio 370, on the 19th May, 1866.

(Written in red ink across the face:)
Erased July 18th, 1867, by certificate of sheriff.
(Signed) MICH'L DE ARMAS,
Dy Sheriff.

B. 69, f. 716. The one he granted in favor of Merchants' Insurance Company per act before same notary public, dated 28th May, 1857, to secure $10,000 00, interest and costs as per said act, recorded 29th May, 1857, and reinscribed in B. 84, fo. 696, on the 25th June, 1867.

B. P. 1, fo. 391. The draining privilege.

No. 98. B'k J. M., No. 7, fo. 512; recorded on the 14th December, 1853. The general one in favor of this city resulting from a judgment rendered by the 6th district court, on the 29th Nov., 1853, for
138 the sum of $137 and 50 cents, with interest stipulated in said judgment, and costs of suit, against J. Menard.

(Written in red ink across the face:)
Erased July 18th, 1867, by certificate of sheriff.
(Signed) MICH'L DE ARMAS,
Dy Sheriff.

No. 19826. B'k J. M., No. 11, fo. 553; recorded on the 18th December, 1865. The general one in favor of Robert H. Bailey, resulting from a judgment rendered by the 3rd district court, on the 24 Nov., 1865, for the sum of $2,050 00, and no cents, with interest stipulated in said judgment, and costs of suit, against Ja's A. McHatton & al.

No. 20441. B'k J. M., No. 11, fo. 635; recorded on the 24th March, 1866. The general one in favor of John T. Delmas, resulting from a judgment rendered by the second district court, on the 8th February, 1861, for the sum of $4,560 and 50 cents, with interest, stipulated in said judgment and costs of suit, against J. Menard & al.

No. 16801. B'k J. M., No. 11, fo. 672; recorded on the 11th May, 1866. The general one in favor of Cha's H. Kernion, resulting from a judgment rendered by the 4th district court, on the 11th April, 1866, for the sum of $3,750 and no cents, with interest stipulated in said judgment, and costs of suit, against Menard & Vignaud.

139 No. 16268. B'k J. M., No. 11, fo. 676; recorded on the 18th May, 1866. The general one in favor of Edw'd Dupasseur, resulting from a judgment rendered by the same court, on the 16th March, 1866, for the sum of $9,800 and no cents, with interest stipulated in said judgment, and costs of suit, against the same.

No. 17436. B'k J. M., No. 12, fo. 130; recorded on the 11th December, 1866. The general one in favor of Pierre Poutz, resulting from a judgment rendered by the same court, on the 27th November, 1866, for the sum of $2,000 and no cents, with interest stipulated in said judgment, and costs of suit, against B. Jourdan and Menard & Vignaud.

B'k J. M., No. 12, fo. 287; recorded on the 17th June, 1867. The general one in favor of Mr. & Mrs. Gibert, resulting from a writ issued by the 5th district court on the 17th June, 1867, for the sum of $1,200 and no cents, with interest stipulated in said judgment, and costs of suit, against Joseph Menard.

N. O., July first, (*July 1st*) 1867.

(Signed) A. DUCATEL, JR.,
D'y Rec'r.

(Written in red ink across the face :)
Erased July 18th, 1867, by certificate of sheriff.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

140 *Order & continuance.—Extract from the minutes, Monday, 4th May,* 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 18234.

This case came on this day for trial—
P. C. Cuvellier for pl'ff;
A. Voorhies & T. W. Collens for def'ts.
After hearing pleadings and argument of counsel, Messrs. Cuvellier & Voorhies,
It is ordered by the court that the case be continued to Thursday, 7th ins't, at 11 o'clock a. m., to hear further argument.

Order.—Case submitted.—Extract from the minutes, Thursday, 17th May, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY. } No. 18234.

This case was submitted this day, after hearing further argument of counsel.

Judgment.—Filed May 9th, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. } No. 18234.

In this case the court having duly considered the pleadings,
141 evidence, and the law applicable thereto, and the law and evidence being against the plaintiff, intervenors, and opponents,
It is therefore adjudged and decreed that the demands of the plaint-

iff and of the intervenors and opponents herein, be dismissed at their respective costs.

Judgment signed May 21st, 1868.

(Signed) CHA'S LEAUMONT, *Judge*.

Bill of exception.—Filed May 11th, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY & others. } No. 18234.

Fifth district court.

Be it remembered that on the trial of this case, after the defendant Delmas had offered the record and judgment in the case entitled John T. Delmas vs. Jos. Menard and Menard & Vignaud, No. 20441, of the second district court, the counsel for the Merchants' Insurance Co. called the defendant Delmas to the stand for the purpose of propounding interrogatories to him and examining him as a witness to show what was the contract or obligation and cause of action on which the judgment was based and to enquire whether the cause and
142 consideration thereof was confederate money; to which the counsel for the defendant objected on the grounds:

1st. That the matters enquired of were merged and barred by the judgment, and were past enquiry.

2d. That any fraud or immorality affecting said judgment could not be set up and enquired of collaterally even by third parties, but any such ground could be only urged in the revocatory action or by appeal or by action of nullity.

3d. That the action of nullity, the revocatory action, and the right of appeal against said judgment, being now prescribed, the said judgment is res adjudicata to all the world.

But the court overrules these objections and required the witness to answer, whereupon he reserved this his bill of exception, which is allowed and signed.

(Signed) CHA'S LEAUMONT, *Judge*.

Motion of appeal.—Filed May 22nd, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & AL. } No. 18234.

Fifth district court.

143 On motion of Collens & Wooldridge, esq's, of counsel for John T. Delmas, one of the defendants herein, and on suggesting to the court that said defendant is advised there is error to his prejudice in the judgment rendered herein,

It is ordered that said John T. Delmas be allowed a suspensive appeal, returnable to the supreme court on the last Monday of June next, on his giving bond and security in the sum of ten thousand dollars, according to law.

Bond of appeal.—Filed 22nd May, 1868.

Know all men by these presents, that we, John T. Delmas, as principal, and S. H. Boyd, as surety, are held and firmly bound unto John Henderson, Merchants' Mutual Ins. Co., Robert H. Bailey, Charles H. Kernion, Ed. Dupasseur, Pierre Poutz, Joseph Menard, and all and any parties interested, executors, administrators and assigns, in the sum of ten thousand dollars, for the payment whereof we *bring* ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this 22nd
144 day of May, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas the above-bounded John T. Delmas, this day filed a motion of appeal from a final judgment rendered against him in the suit of John Henderson vs. Merchants' Mutual Insurance Co., R. H. Bailey, John T. Delmas, Chas. H. Kernion, Ed. Dupasseur, Pierre Poutz, & Jos. Menard:

Now the condition of the above obligation is such, that the above-bound John T. Delmas shall prosecute his said appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said S. H. Boyd shall be liable in his place.

(Signed) J. T. DELMAS. [L. S.]
S. H. BOYD. [L. S.]

Signed, sealed, and delivered in presence of—

Certificate.

145 I, Francis A. Woolfley, clerk of the fifth district court of New Orleans, do hereby certify that the above and foregoing one hundred and forty-five pages contain a true and correct transcript of all pleadings and documents filed, evidence adduced, and all the proceedings had upon the trial of the suit, wherein John Henderson is plaintiff, and the Merchants' Mutual Ins. Co. & al. are defendants, the same being numbered No. 18234 of the docket of said court, and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-second year of the independence of the United States of America.

(Signed) T. A. WOOLFLEY, *Clerk.*

146 State of Louisiana, fifth district court for the parish of Orleans.

Additional transcript.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. & ALS. } No. 18234.

Supreme court of La. Filed Nov. 2nd, 1868.

(Signed) M. P. JULIAN,
Dep'y Clerk.

Motion of appeal.—Filed May 26th, 1868.

On motion of P. Chas. Cuvellier, of counsel for John Henderson, the plaintiff herein, and on suggesting to the court that said plaintiff is advised that there is error to his prejudice in the judgment rendered in this case,

It is ordered that said John Henderson, plaintiff, be allowed a suspensive appeal, returnable to the supreme court of the State of
147 Louisiana on the first Monday of November next, on his giving bond and security in the sum of ten thousand dollars, according to law.

Bond of appeal.—Filed May 26th, 1868.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 18234.

Know all men by these presents, that we, John Henderson, of New Orleans, as principal, and James Hagan, also of New Orleans, as security, are held and firmly bound unto the Merchants' Mutual Insurance Company of New Orleans, John T. Delmas, Joseph Menard & als., their executors, administrators, and assigns in the sum of ten thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this twenty-sixth day of May, in the
148 year of our Lord one thousand eight hundred and sixty-eight.

Whereas the above-bounden John Henderson this day filed a petition of appeal from a final judgment rendered against him in the suit of John Henderson vs. Merchants' Mutual Insurance Company et als., No. 18234, in the fifth district court of New Orleans, on the ninth day of May, A. D. 1868:

Now the condition of the above obligation is such, that the above-bounden John Henderson shall prosecute his said appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said James Hagan, surety, shall be liable in his place.

(Signed) JOHN HENDERSON. [L. S.]
(") JAMES HAGAN. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) P. CHAS. CUVELLIER.

Certificate.

149 State of Louisiana, fifth district court for the parish of Orleans.

I, Louis Power, clerk of the fifth district court for the parish of Orleans, and as such duly commissioned and sworn, do hereby certify that the foregoing three pages do contain a correct and complete transcript of all the proceedings had and documents filed since the making of the original transcript to be filed in the supreme court of the State of Louisiana, on the appeal of John T. Delmas, in the suit wherein John Henderson is plaintiff, and Merchants' Mutual Insurance Company et als. are defendants, the same being numbered No. 18234 of the docket of this court.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court at the city of New Orleans, this thirtieth day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-third year of the independence of the United States of America.

(Signed) LOUIS POWER, *Clerk.*

150 *Agreement of counsel.*

It is agreed that the transcript heretofore filed by John T. Delmas, as appellant in this case, in the supreme court of La., shall be used and shall serve as a transcript in the appeal by John Henderson in the same case, for all matters of record, proceedings, evidence, or action, not included in this supplemental transcript, the said John Henderson being dispensed from filing any other than the present supplemental transcript. It is also agreed that the appeal of the said John Henderson shall be consolidated and tried together with the appeal of the said John T. Delmas.

New Orleans, October 31st, 1868.

(Signed) P. CHA'S CUVELLIER,
Att'y for John Henderson, Pl'ff and App'l't, & for John Henderson, Security on Injunction Bond.

(Signed) A. & M. VOORHIES,
Att'y for Merch'ts' Ins. Co. & P. Poutz.

(Signed) A. ROBERT,
Attorney for Chas. Kernion.

(Signed) L. CHARVET,
Att'y for J. Menard.

(") E. H. McCALEB,
Att'y for J. T. Delmas.

Filed Nov. 2nd, 1868.

151 (Signed) M. P. JULIAN,
Dep'y Clerk Sup. Court.

Extract from the minutes.

Supreme court of Louisiana.

MONDAY, *May 17th*, 1869.

The court was duly opened, pursuant to adjournment

Present, their honors John T. Ludeling, chief justice; and James G. Taliaferro, Rufus K. Howell, W. G. Wyly, W'm W. Howe, associate justices.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY et als. } No. 1848.

On oral consent thereto of counsel for all parties present in court, this case, fixed for this day, was taken by the court under advisement upon the papers and the briefs for defendant and appellant, and the briefs to be filed on the part of the Merchants' Mutual Insurance Company, defendant and appellee herein.

Extract from the minutes.—Decree.

Supreme court of Louisiana.

MONDAY, *November* 15*th*, 1870.

The court was duly opened, pursuant to adjournment.

Present, their honors. John T. Ludeling, chief justice; and
152 James G. Taliaferro, Rufus K. Howell, W. G. Wyly, W'm W. Howe, associate justices.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY et als. } No. 1848.

On appeal from the 5th district court of New Orleans.

It is ordered that the judgment of the lower court dismissing plaintiff's demand be reversed, and it is now ordered that there be judgment in his favor, with costs, perpetuating the injunction herein for the excess of defendant's writ of seizure and sale over and above the sum of three thousand four hundred and ninety-nine $\frac{07}{100}$ dollars, ($3,499 07,) and the interest thereon at eight per cent. from 1st July, 1867, for which sum and interest the said order of seizure and sale is hereby maintained. It is further ordered that, as thus amended, the judgment
153 be affirmed; costs of appeal to be paid by John T. Delmas and The Merchants' Mutual Ins. Co.

Opinion of the court.

Supreme court of Louisiana.

Filed Nov. 15th, 1869.
(Signed) M. P. JULIAN, *Dep'y Clerk.*

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY et als. } No. 1848.

Appeal from the 5th district court of New Orleans.

Mr. JUSTICE HOWELL:

On the first day of July, 1867, the plaintiff, John Henderson, bought at sheriff's sale, under executory process, sued out by Gibert against Jos. Menard, a lot and improvements, in New Orleans for $5,625, and after paying the claim of the seizing creditor, costs, and certain privileges, retained in his hands the sum of $3,499 07, to be applied to the payment of the subsequent mortgages set forth in the certificate of the recorder of mortgages, read by the sheriff at the time of the sale. According to said certificate there was a special mortgage in favor
154 of the Merchants' Mutual Insurance Company for $10,000, granted by the debtor, Joseph Menard, on the 29th May, 1857, and reinscribed on the 25th June, 1867, and several judicial mortgages resulting from judgments recorded prior to the reinscription of the above special mortgage.

Subsequent to the said purchase, The Merchants' Insurance Company obtained an order of seizure and sale against said property for $5,000, interest and attorney's fees, and asked that demand of payment and notice of seizure be served on Joseph Menard and John Henderson, alleging the latter to be the holder and possessor of the property, who refuses to pay, and that demand had been made of Menard more than thirty days prior thereto, whereupon Henderson instituted this proceeding by injunction, to restrain the sale of the property, on the following grounds:

1st. The note on which the said claim is based is prescribed by five years.

155 2d. The mortgage securing said note is prescribed by ten years, and the reinscription, after the lapse of more than ten years, could not impair the precedence of other mortgages.

3d. The property having been sold under an anterior mortgage could not be again seized and sold for an amount more than the balance of the purchase price in the hands of the purchaser.

4th. The order of seizure and sale issued upon insufficient evidence, in that there is no authentic evidence of the removal or extension of the note; there is no stamp on said note; there is no allegation nor legal proof that the mortgage was reinscribed in due time, the evidence of which must be stamped; there is no declaration in the affidavit or petition that the debt is due the plaintiff in the hypothecary action; and there is no allegation that ten days' notice had been given to the third possessor. All the parties in interest are called into court to discuss

156 their rights to the said balance of the price, and a prayer that all mortgages be canceled.

Issue was joined as to the several parties; but it is necessary to examine the defense set up by only two, J. T. Delmas, a judicial mortgagee, and The Merchants' Insurance Company.

Delmas answers that, having a judgment in the 2nd district court of New Orleans, amounting to $5,486 73, against Joseph Menard, and the firm of Menard and Vignaud, he issued a garnishment process, and seized in the hands of Henderson the sum of $3,499 07, the balance of the price of the property of Menard bought by Henderson, and which belonged and accrued to said Menard; that, to the interrogatories propounded, Henderson admitted owing said sum, but, failing to pay, proceedings have been taken to compel him to do so; that respondent's judicial mortgage takes precedence of the pretended mortgage of the Merchants' Insurance Company, which and the claim are prescribed by ten and five years, and Menard could not waive or renounce to

157 the prejudice of respondent's rights. He specially denies that Menard has any other property out of which his judgment can be satisfied, and avers that by his seizure he has acquired a privilege on the funds in the purchaser's hands, and he prays that the injunction be maintained against the insurance company, and that Henderson be ordered to pay his whole claim.

The Merchants' Insurance Company, besides the general issue, denies the validity and finality of the judgment set up by Delmas, for the reason that the consideration of the claim on which it is based was confederate money; propounds interrogatories to him to prove the fact, and prays that his said judgment be declared null.

There was judgment dismissing the demands of all the parties at their respective costs, and Henderson & Delmas have appealed.

We will dispose first of the demand of Delmas, the judicial mortgagee.

Admitting the correctness of the legal positions assumed by him, he

is successfully met by the plea to the validity of his judgment,
158 which is not yet executed. His answers to the interrogatories leave no doubt that the said judgment was based on a contract or agreement, the consideration of which was confederate money, and is therefore null. To render the decree asked for by him would be to enforce a prohibited agreement. (Art. 127, Const.) The district court did not, therefore, err in dismissing his demand.

As to questions between the plaintiff and the Merchants' Insurance Company, it need only be remarked that the latter, holding the special mortgage next in rank to the one under which the property was sold, has the right under the law and the facts of this case to the balance of the price, and interest retained by the purchaser, who is personally liable for its payment, and ten days' notice is consequently not required. (C. P., 707 et seq., 16 La., 163.) The injunction should be perpetuated, however, as to the excess. We deem the objection as to stamps of no weight. The note, having been made prior to the date of the stamp act, was exempt, and the extensions of payment are not such agree-
159 ments as require stamps under said act. There is no evidence as to the stamp on the act of reinscription of the mortgage, and if a stamp is necessary the presumption is in favor of the officer. The other questions presented in the record merit no consideration.

It is, therefore, ordered that the judgment of the lower court dismissing plaintiff's demand be reversed; and it is now ordered that there be judgment in his favor with costs perpetuating the injunction herein for the excess of defendant's writ of seizure and sale over and above the sum of three thousand four hundred and ninety-nine $\frac{07}{100}$ dollars, ($3,499 07,) and the interest thereon at eight per cent. from 1st July, 1867, for which sum and interest the said order of seizure and sale is hereby maintained.

It is further ordered that, as thus amended, the judgment be affirmed, costs of appeal to be paid by J. T. Delmas and the Merchants' Mutual Insurance Company.

Petition for rehearing.

Supreme court of La.

Filed Nov. 22nd, 1869.

160 (Signed) M. P. JULIAN,
Dep'y Clerk.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INS. CO. ET ALS. } No. 1848.

The petition of John T. Delmas, one of the defendants in the above-entitled case, praying for a rehearing, respectfully shews:

That your honors have misapprehended the facts shown by the record with respect to the consideration of the contract on which the judgment in the case of Delmas vs. Menard and Vignaud was based.

The contract is in writing. It is copied at page 207 of the record. It sets forth simply that M. & V. sell 250 thousand bricks to Delmas, at $8 25 per M., promise to deliver the same at a certain place within four months, and acknowledge, 3rd March, 1862, payment of the price in advance.

The suit and judgment of Delmas vs. Menard et als. (see pages 121

and 177) was for restitution of the price paid, $2,062 50 and dam-
161 ages, caused by the failure of Menard to deliver the bricks. These damages amount to $2,500.

Menard, (as your honors will see by the record just cited) defended the suit sharply and persistently; but in no place or time did he ever complain or attempt to shew that the payment acknowledged was made in confederate money. Final judgment was rendered against him and his codefendants; and on the authority of Murison vs. Butler et als. the enquiry into antecedent matters was forever closed. (See our bill of exceptions, p. 215 and 217.)

But even if it were not and another creditor had a right to plead illegality against us, then we respectfully submit that your honors have wholly mistaken the facts.

We contend that no such illegality was proved.

The only evidence on the point are the answers of Delmas to the interrogatories on fact and articles propounded on behalf of the Merchants' Insurance Company.

Your honors will find those questions and answers at pages 70, 71, 72, 73, and 74 of the record. We also annex a copy of them to
162 this petition and beg your honors to reconsider them for they do not shew the fact alleged.

The onus was on the insurance company to prove their allegation clearly. All presumption and theory must be framed in favor of innocence on an accusation of fraud or immorality or treason.

So your honors have decided in several cases exactly parallel, (Anfoure case, Shackleford case, etc.)

Your honors will remember, and it is historically known to you, that on the 17th September, 1861, on a proclamation from Jeff. Davis, followed by another from T. O. Moore, the banks suspended payment of deposits, and began to receive and pay out confederate notes, which they had not done before.

At the moment of this illegal and outrageous act, Delmas had, as shewn by his answers, a deposit in the Citizens' Bank, amounting to four, five, or six thousand dollars in "notes of the Bank of Louisiana, Citizens' Bank, and such issues as these banks had issued."

163 On making the contract with Menard, Delmas gave him "a check" for the advance stipulated in the contract.

The contract stipulated "dollars" Delmas' bank account called for "dollars," and the check required the payment of "dollars." (See contract and answer to interrogatories.)

Not a word was said or written stipulating any consideration in confederate currency. Nothing shews that a payment in that currency was agreed on.

Now the only possible pretention of the contestants is the supposition that Menard presented that check at the bank, and there accepted confederate notes for it, but this is a mere probable inference, and it is very possible that it was not so. It is possible that Menard may have (as commonly done) deposited the check in another bank, and received credit for it in dollars, or he may have used it, making purchases or payments, also a very common way of using checks.

At any rate, there is no proof that confederate currency was
164 contemplated by the parties. On the contrary, it is shewn that Delmas had deposited other currency, id est, bank notes, so that this case is stronger for the suitor than in the similar cases your honors have decided.

The fact that Delmas did not know how and in what currency the

check was paid, or whether the holder of it consented to accept confederate notes, or his thinking it very likely that they did so, cannot be construed into the absolute fact that it was so; and even if it were so, Delmas would not be bound or his rights be affected by such subsequent action or use made of his check. So your honors have decided. The subsequent use was no concern of his.

Hoping that your honors will take the trouble of reading Delmas' answers again, and apply the facts in harmony with the rules and doctrine of previous decisions, we respectfully submit this petition for a rehearing.

165 (Signed) E. HOWARD McCALEB,
Att'y for J. T. Delmas.

Interrogatories annexed to the petition.—Filed Nov. 22nd, 1870.

(1.) What was the consideration of your claim against J. Menard and Menard and Vignaud?

(2.) Was the firm of Menard and Vignaud the surety of J. Menard in that transaction?

(3.) Was not confederate currency or money given or exchanged on that occasion?

(4.) State what money was given to Menard; by whom; gold, silver or paper, and what paper.

JOHN T. DELMAS, sworn to answer interrogatories to him propounded:

Answer to 1st int'y. It was for the fulfilment of the contract & damages for not complying with the contract, and for money advanced on the contract.

(Contract annexed to answer offered in evidence.)

Answer to 2nd int'y. They were.

166 Answer to 3rd int'y. No, sir.

Answer to 4th int'y. There was no money given.

Answer to 5th int'y. A check.

Witness, further examined on the stand, says:

Q. Do you know what check was?

A. I do not.

Q. Can you say it was not paid in confederate money?

A. I cannot; how can I say? I was not paying teller of the bank.

Q. What money did you have deposited in the bank; was it confederate money?

A. I do not recollect. I generally kept an account like any other man, and sometimes had a balance of three, four, and as much as ten thousand dollars.

Q. At that time were not the whole payments of the bank in confederate money?

A. I don't know. I think it is very likely it was so.

Q. Did you have a gold deposit at that time?

A. I think not. I had a considerable balance of city money
167 of their own currency—their original currency—some four, five, or six thousand dollars, perhaps more, at the time the banks commenced paying in confederate money.

Q. What city currency was that?

A. Notes of the Bank of Louisiana, Citizens' Bank, and such issues as these banks issued.

Q. At that time did you expect your checks to be paid in bank notes or confederate notes?

A. I suppose they paid in confederate notes; I don't know.

Q. Did you have any silver deposited in that bank that you could draw?

A. No, sir; there was no gold or silver in circulation then.

Q. You cannot affirm, then, that that check was not paid in confederate currency?

A. No, sir.

Cross-examined:

Q. At the time the banks suspended their payments in silver and gold, their own notes, and bank notes, and substituted con-
168 federate money, I understand you to say you had a large balance in that bank at this time?

A. I think I had. I always kept an account with them, and always had a balance—sometimes considerable.

Q. The deposits you had made were credited purely and simply as so many dollars?

Ans. So many dollars and cents.

Q. And the check you drew was for so many dollars plain, without any qualification?

A. None whatever.

Q. You don't know what use Mr. Menard made of that check?

A. I don't know what he did with it.

A true copy.
(Signed) M. P. JULIAN,
Dep'y Clerk.

Extract from the minutes.—Rehearing refused.

Supreme court of La.

MONDAY, *Dec. 13th*, 1869.

The court was duly opened pursuant to adjournment. Present, their honors James G. Taliaferro, W. G. Wyly, W'm W. Howe, as-
169 sociate justices. Absent, John T. Ludeling, chief justice; R. K. Howell, ass'e justice.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY et als. } No. 1848.

It is ordered that the rehearing applied for in this case be refused.

Petition for writ of error.

Supreme court of La.

STATE OF LOUISIANA,
City of New Orleans:

To the honorable the supreme court of Louisiana:

The petition of John T. Delmas, of the State aforesaid, respectfully

shews that, in the suit No. 1848 on the docket of the supreme court, a judgment was rendered against your petitioner, by which he has suffered damage, and in which, in his opinion, there is error.

He further shews that, in the said cause, there was drawn in question the application of article 127 of the constitution of the State of Louisiana, which declares, "that all agreements, the consideration of
170 which was confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this State," and that, by the decision and judgment of the supreme court, a judgment in favor of the petitioner was rejected, and its leading allegation denied in the said cause, in violation of the 10th section of the first article of the Constitution of the United States, which prohibits a State "to pass any law impairing the obligation of contracts," which the defendant insists supports the judgment in his favor so rejected as aforesaid.

And there was further drawn in question whether an instrument of evidence, offered by the defendants, was stamped properly according to the acts of Congress, and that the same was not valid under those acts, but that the supreme court determined that no stamp was necessary, and that the act of Congress invoked by your petitioner was not violated.

Your petitioner prays that, for the matters aforesaid apparent upon the record of the said cause No. 1848, entitled John Henderson vs. Merchants' Mutual Insurance Co. et als., on the docket of the court, that the court would allow a writ of error to the Supreme Court of the United States, to be held the first Monday of December next, and that the chief justice may sign the citation to the defendants in error, and that the amount of the bond to serve as a supercedias of any execution may be fixed. And your petitioner will pray, etc., etc.

(Signed) E. WOOLDRIDGE,
Of Counsel for Petitioner.

(Signed) E. HOWARD McCALEB,
Att'y for Pet'rs.

171 *Order.*

Supreme court of La.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INSURANCE CO. ET ALS. } No. 1848.

In this case an application for a writ of error to the Supreme Court of the United States has been made on the following grounds:

1st. Because, it is alleged, there was drawn in question the application of article 127 of the constitution of the State of Louisiana, and that, by the judgment of the supreme court of Louisiana, the claim of petitioners was rejected, in violation of article one, section two, of the Constitution of the United States.

2d. Because there was drawn in question the construction of an act of Congress relative to stamps, and the decree of the court was that the said act of Congress was inapplicable to the case.

We refuse to grant the writ of error on the first ground, because, under the settled jurisprudence of Louisiana, before the adoption of the constitution of 1868, and since, the judgment of the court would have been the same, whether article 129 of the constitution had vitality or not; and the article of the constitution was referred to only as an ad-

ditional reason for the opinion of the court. (Armstrong vs. Lecomte, 21 An., 528; A. D. Palmer vs. H. Marston, 22 An., ; Wainwright, adm'r, vs. Bridges, 19 An., 234; Drauguet vs. Rost, 21 An. 538.)

172 "When the record shows that the State court might have disposed of the case, and for ought that appears did decide it, without deciding any question under an act of Congress against the plaintiff in error, the Supreme Court of the United States has no jurisdiction." (Ocean Insurance Co. vs. Palley, 13 Peters, 157; 15 Peters, 18; 7 How., 172; 12 How., 3, (Curtis' ed.;) 3 Wal., 246.)

On the second ground, the applicant is entitled to a writ of error.

It is therefore ordered that a writ of error be granted, returnable to the Supreme Court of the United States, in Washington City, D. C., on the first Monday of December next, 1870, on the plaintiff in error giving a bond in the sum of five hundred dollars, conditioned as the law requires.

(Signed) JNO. T. LUDELING,
Chief Justice of the Sup. Court of the State of La.

Supreme court of La.

Filed June 2nd, 1870.
(Signed) M. P. JULIAN,
Dep'y Clerk.

Bond for writ of error.

Supreme Court of Louisiana.

Filed June 2nd, 1870.
173 (Signed) M. P. JULIAN,
Dep'y Clerk.

JOHN HENDERSON
vs.
MERCHANTS' MUTUAL INS. COMPANY ET ALS. } No. 1848.

Know all men by these presents that we, John T. Delmas as principal, and S. H. Boyd as surety, are held and firmly bound unto John Henderson, Merchants' Mutual Insurance Co., Rob't H. Bailey, Cha's H. Kernion, Ed. Dupasseur, Pierre Poutz, Jos. Menard, and all and any parties interested, in the full and just sum of ten thousand dollars, to be paid to the said John Henderson, Merchants' Mutual Ins'ce Company, and said others named above, or either of them, certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents, sealed with our seals, and dated this 21st day of December, in the year of our Lord

174 one thousand eight hundred and sixty-nine.

Whereas lately, at a supreme court of the State of Louisiana, in a suit depending in said supreme court wherein John Henderson was plaintiff, and said John T. Delmas, and said others above named were defendants, judgment was rendered against the said John T. Delmas, defendant; and the said John T. Delmas having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Henderson, Merchants' Mutual Ins'ce Co., Rob't

H. Bailey, Cha's H. Kernion, P. Poutz, Ed. Dupasseur, Jos. Menard, citing and admonishing them and each of them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said John T. Delmas shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then the above
175 obligation to be void; else to remain in full force and virtue.

(Signed) J. T. DELMAS. [L. S.]
" J. H. BOYD. [L. S.]

Sealed and delivered in the presence of—
(Signed) T. WHARTON COLLENS. [L. S.]

Approved.
(Signed) JNO. T. LUDELING,
Chief Justice Supreme Court State of La.

176 *Citation to John Henderson.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to John Henderson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this the 2nd day of June, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the S. C. of Louisiana.

177 *Citation to Merchants' Mut. Ins. Co.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Merchants' Mutual Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this the 2nd day of June, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

178 *Citation to Cha's H. Kernion.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Cha's H. Kernion, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this fifth day of July, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

179 *Citation to Jos. Menard.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Joseph Ménard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this fifth day of July, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of Louisiana.

180 *Citation to P. Poutz.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Pierre Poutz, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States of America, to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this fifth day of July, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of La.

181 *Citation to Rob't H. Bailey.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Rob't H. Bailey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this fifth day of July, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

182 *Citation to Ed. Dupasseur.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Ed. Dupasseur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this fifth day of July, A. D. 1870.

JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

183 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to the Merchants' Mutual Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this 2nd day of June, anno Domini 1870.

[SEAL] (Signed) JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

A true copy.

M. P. JULIAN,
Dep'y Clerk.

184 (Indorsed:) 5th dist. court, No. 18234.

For return.

Rec'd, July 12th, 1870, and on the thirteenth day of the same month and year, served a copy of the within citation of appeal on the Merchants' Mutual Insurance Company through its president, Paul Fourdy, who accepted service of the same and whose name and facts connected with this service I ascertain'd by interrogating him. Returned same day.

P. AD. FORTIER,
Deputy Sheriff.

P. A. Fortier, dep'y sh'ff, being duly sworn, deposes that all the facts of his return are true and correct.

P. AD. FORTIER,
D'y Sh'ff.

Sworn to and subscribed before me this the 28th of July, 1870.

[SEAL] M. P. JULIAN,
Dep'y Clerk Sup. Court.

185 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to John Henderson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, where-

in John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this the 2nd day of June, anno Domini 1870.

(Signed) JOHN T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

A true copy.
[SEAL] M. P. JULIAN,
Deputy Clerk.

186 (Indorsed:) 5th dist. court, No. 18234.

For return.

Rec'd, July 12, 1870, and on the thirteenth day of the same month and year served a copy of the within citation of appeal on John Henderson in person. Returned same day.

P. AD. FORTIER,
Deputy Sheriff.

P. A. Fortier, dep'y sh'ff, being duly sworn, deposes that all the facts and allegations of his return are true and correct.

P. AD. FORTIER,
D'y She'ff.

Sworn to and subscribed before me this the 28th of July, 1870.
[SEAL] M P. JULIAN,
Dep'y Clerk Sup. Court.

187 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Ed. Dupasseur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this fifth day of July, A. D. 1870.

[SEAL.] (Signed) JOHN T. LUDELING,
Chief Justice of the Sup. Court of the State of Louisiana.

A true copy.

M. P. JULIAN,
Dep'y Clerk.

188 (Indorsed:) 5th dis't court, 18234.

For return.

Rec'd, July 28th, 1870, and on the same day, month, and year, served a copy of the within citation of appeal on Edward Dupasseur by personal service on Ant. Bidault, liquidator, and whose name and facts connected with this service I learned by interrogating him, the said Ed. Dupasseur being absent from (in Paris, France,) the city at the time of said service. Returned same day.

P. AD. FORTIER, *D'y Sh'ff.*

P. A. Fortier, dep'y sh'ff, being duly sworn, deposes that all the facts of his return are true and correct.

P. AD. FORTIER, *D'y Sh'ff.*

Sworn to and subscribed before me this, the 28th of July, 1870.
[SEAL.] M. P. JULIAN,
Dep'y Clerk Sup. Court.

189 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Pierre Poutz, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this fifth day of July, A. D. 1870.

[SEAL.] (Signed) JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of La.

A true copy.

M. P. JULIAN,
Dep'y Clerk.

190 (Indorsed:) 5 &c., No. 18234.

For return.

Rec'd July 28th, 1870, and on the fifth day of the same month and year served copy of the within citation of appeal on Pierre Poutz in person. Ret'r'd same day.

P. AD. FORTIER, *D'y Sh'ff.*

P. Ad. Fortier, dep'y sh'ff, being duly sworn, deposes that all the facts of his return are true and correct.

P. AD. FORTIER, *D'y Sh'ff.*

Sworn to and subscribed before me this, the 5th day of August, 1870.
[SEAL.] M. P. JULIAN,
Dep'y Clerk Sup. Court.

191 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Rob't H. Bailey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans this, the fifth day of July, anno Domini 1870.

[SEAL.] (Signed) JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of Louisiana.

A true copy.

M. P. JULIAN,
Dep'y Clerk.

192 (Indorsed:) 5th dis't court, No. 18234.

For return.

Rec'd, July 28th, 1870, and on the thirtieth day of the same month and year, and after due and diligent search and inquiry made, I was credibly informed by Joseph E. Logan that Rob't H. Bayley is now in St. Catharine, Canada, and knows of one here to represent him. I therefore return the within citation of appeal: "Could not be found." Returned same day.

P. AD. FORTIER, *D'y Sh'ff.*

P. Ad. Fortier, dep'y sh'ff, being duly sworn, declares that all the facts of his return are true.

P. AD. FORTIER, *D'y Sh'ff.*

Sworn to and subscribed before me this, the 5th day of August, 1870.

[SEAL.] M. P. JULIAN,
Dep'y Clerk Sup. Court.

193 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Cha's H. Kernion, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans,

wherein John T. Delmas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of New Orleans, this the fifth day of July, 1870.

[SEAL.] (Signed) JNO. T. LUDELING,
Chief Justice of the Supreme Court of the State of La.

A true copy.

M. P. JULIAN,
Dep'y Clerk.

194 (Indorsed:) 5 dist. c't. 18234.

For return.

Rec'd, July 28th, 1870, and on the 29th day of the same month and year, and after due and diligent search and inquiry made, I was credibly informed by Octave L. Huchet Kernion, cousin of Charles H. Kernion, that the said Ch's H. Kernion is now a resident of Orleans, France, and knows of no agent or any one here to represent him. I therefore return the within citation of appeal: "Charles H. Kernion could not be found." Returned same day.

P. AD. FORTIER, *D'y Sh'ff.*

P. Ad. Fortier, dep'y sheriff, being duly sworn, deposes that all the facts and allegations of his return are true.

P. AD. FORTIER, *D'y Sheriff.*

Sworn to and subscribed before me, this the 29th of July, 1870.

[SEAL.] M. P. JULIAN,
Dep'y Clerk Sup. Court.

195 *Citation for service & sh'ff's return.*

UNITED STATES OF AMERICA,
State of Louisiana:

The President of the United States of America to Joseph Menard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein John T. Delmas is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal at the city of New Orleans, this fifth day of July, A. D. 1870.

[SEAL.] (Signed) JNO. T. LUDELING,
Chief Justice of the Sup. Court of the State of La.

A true copy.

M. P. JULIAN, *Dep'y Clerk.*

196 (Indorsed:) 5th dis't c. 18234.

For return.

Rec'd, July 28th, 1870, and on the twenty-ninth day of the same month and year, served a copy of the within citation of appeal on Joseph Menard in person. Returned same day.

P. AD. FORTIER, *D'y Sh'ff.*

P. Ad. Fortier, dep'y sh'ff, being duly sworn, deposes that all the facts and allegations of his return are true.

P. AD. FORTIER, *D'y Sh'ff.*

Sworn to and subscribed before me, this the *the* 29th of July, 1870.

[SEAL.] M. P. JULIAN,
Dep'y Clerk Sup. Court.

197 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana and holding sessions in New Orleans, Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John Henderson, pl'ff, and Merchants' Mutual Insurance Company et als., defendants, namely, John Henderson, Charles K. Kernion, Joseph Menard, Pierre Poutz, Robert H. Bailey, Edward Dupasseur, and Merchants' Mutual Insurance Company, a manifest error hath happened, to the great damage of the said John T. Delmas, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 11th day of July, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) Supreme court of the State of La. No. 1848. John Henderson versus Merchants' Mut. Ins'e Co. et als. Writ of error. Sup. court of La. Filed July 11th, 1870. M. P. Julian, dep'y clerk.

198 *Certificate of the clerk.*

UNITED STATES OF AMERICA:

Supreme court E. D. State of Louisiana.

I, M. P. Julian, deputy clerk of the supreme court of the State of Louisiana for the eastern district, do hereby certify that the foregoing 197 pages contain a true copy of the transcript of the proceedings had in the fifth district court of New Orleans in a certain suit wherein John Henderson was plaintiff, and The Merchants' Mutual Insurance Company et als. were defendants; and, also, of the proceedings had in this supreme court on the appeal taken by said John T. Delmas, one of the defendants herein, which appeal is now on the files thereof under No. 1848.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at the city of New Orleans, this twenty-ninth
199 (29th) day of August, A. D. 1870, and in the ninety-fifth year of the independence of the United States of America.

[SEAL.] M. P. JULIAN,
Deputy Clerk.

Certificate of the judge.

UNITED STATES OF AMERICA:

Supreme court E. D. State of Louisiana.

I, John T. Ludeling, chief justice of the supreme court of the State of Louisiana, do hereby certify that M. P. Julian is a deputy clerk of the supreme court for the eastern district; that the signature of M. P. Julian to the within certificate is in the proper handwriting of him, the said deputy clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal at Monroe, this 3d day of September, A. D. 1870.

[SEAL.] JNO. T. LUDELING,
Chief Justice Supreme Court of the State of Louisiana.

200 *Certificate of the clerk.*

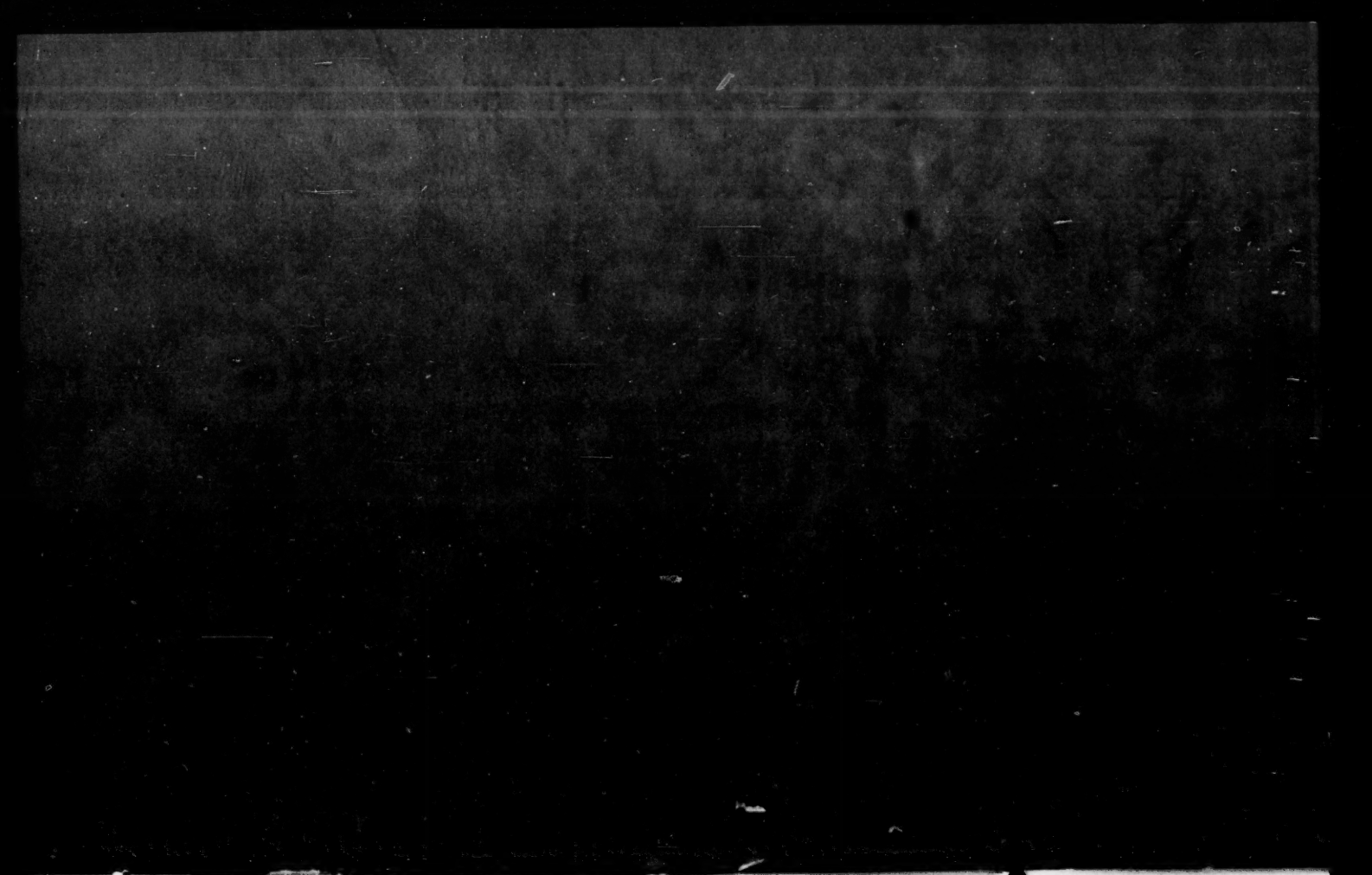
Supreme court of the State of Louisiana.

I, M. P. Julian, dep'y clerk of the supreme court of the State of Louisiana, do hereby certify that the Hon. Jno. T. Ludeling is, and was at the time of signing the foregoing document, presiding judge of our supreme court, and that the signature affixed to the same is in the proper handwriting of him, the said judge.

In testimony whereof I have hereunto set my hand and affixed the seal of this hon. court on this 13th day of September, A. D. 1870.

[SEAL.] M. P. JULIAN,
Dep'y Clerk.

(Indorsement on cover:) No. 443. John T. Delmas, plaintiff in error, vs. The Merchants Mutual Insurance Company, John Henderson, et al. Louisiana sup. court. Filed 23d December, 1870.



United States Supreme Court.

DECEMBER TERM, 1870.

JOHN T. DELMAR, PLAINTIFF IN ERROR,
vs.
THE MERCHANTS' MUTUAL INSURANCE COMPANY,
JOHN HENDERSON, ET AL.
No. 443.

BRIEF OF COUNSEL OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

All the proceedings below were in the State courts of Louisiana, and conducted according to the peculiar system of practice existing there.

All the parties were residents of New Orleans.

In the fifth district court of New Orleans, Bressole Gibert and wife brought suit against one Joseph Menard, and procured an order to sell certain real property belonging to him to satisfy their claim.

Rec., pp. 20, 21, 22.

The property of Joseph Menard was sold by the sheriff to John Henderson for $5,625 cash, and, according to the practice in Louisiana, Henderson paid to the sheriff the amount due to the judgment creditor, with costs, charges, taxes, &c., and retained in his own hands the remainder, $3,499.07, to be by him applied to the payment of the mortgages subsequent to those of the judgment creditor.

Rec., pp. 24 and 25.

This sale to Henderson took place on the first day of July, 1867.

Rec., p. 24.

On the first of August, 1867, the Merchants' Mutual Insurance Company of New Orleans brought suit in the fifth district court of New Orleans, in a form of action peculiar to the Louisiana practice, alleging themselves to be owners of a promissory note of $5,000, subscribed by Joseph Menard, dated May 28, 1857, at one year, and that the note was secured by mortgage on the same property which Henderson had bought at sheriff's sale; they prayed for judgment against Henderson, making the property he had purchased liable for their claim.

See Rec., pp. 28 and 29.

In consequence of this proceeding of the Merchants' Mutual Insurance Company, on the 9th day of August following Henderson applied by petition to the fifth district court from which the writ he purchased under had issued, setting out the fact of his purchase, its terms and conditions.

He set out that various mortgages existed on the property subsequent in date to the one under which he had purchased, and that they were—

1. One in favor of the Merchants' Mutual Insurance Company for $10,000, recorded 29th May, 1857, and reinscribed on the 25th June, 1867.

2. One in favor of Robert H. Bailey, resulting from a judgment rendered in the third district court of New Orleans, 24th November, 1865, for $2,500, recorded 18th December, 1865.

3. One in favor of John T. Delmar, resulting from a judgment rendered in the second district court of New Orleans, on the 8th February, 1861, for $4,560.50, recorded 24th March, 1866.

4. One in favor of Charles H. Kernion, resulting from a judgment rendered in the fourth district court of New Orleans, on the 11th April, 1866, for $3,750, and recorded on the 11th May, 1866.

5. One in favor of Edward Dupasseur, resulting from a judgment of the fourth district court of New Orleans, on the 16th March, 1866, for $9,800, recorded 18th March, 1866.

6. One in favor of Pierre Poutz, resulting from a judgment of the fourth district court of New Orleans, for $2,000, on the 27th November, 1866, and recorded 11th December, 1866.

Henderson declared himself ready to pay the $3,499.07 he had retained to the parties, but unable to decide on their conflicting claims.

He alleged that the Merchants' Mutual Insurance Company had instituted in the fifth district court of New Orleans a suit against him, Henderson and Joseph Menard, to make the same property he (Henderson) had purchased at the sheriff's sale subject to a mortgage of $5,000, made on the 19th May, 1857.

He further alleged he had been garnisheed by John T. Delmar, a creditor of Joseph Menard, by mortgage, in the sum of $4,560.

He prayed for an injunction against the Merchants' Mutual Insurance Company restraining them from proceeding against the property, and for an order to all the parties setting up claims against the property to interplead as to the balance in his hands of $3,499.07.

See petition, Rec., pp. 1 to 4.

All the parties answered except Dupasseur and Menard. C. H. Kernion answered by a general denial.

See Rec., p. 12.

John T. Delmar answered that he obtained a judgment

against Joseph Menard in the second district court of New Orleans, and, on *fi. fa.* issued on said judgment, seized, in the hands of John Henderson, the surplus of the price of the property he (Henderson) had bought under the execution against Menard; and that by reason of his judgment, the said seizure, and his mortgage, he was entitled to the money in Henderson's hands. That his mortgage had precedence over that of the Merchants' Mutual Insurance Company.

He answered further that the mortgage claimed by the said company was null and void, and barred, as well as the note it was given to secure, by prescription.

He prayed that he might be declared entitled to the money in Henderson's hands, in preference to the Merchants' Mutual Insurance Company and all others.

See Rec., pp. 12 and 13.

The Merchants' Mutual Insurance Company answered by a general denial, prayed that they be paid by preference as special mortgagees, and that the claim of (Henderson) the plaintiff and of (Delmar and others) the interveners might be rejected.

See Rec., p. 17.

Robert H. Bailey answered, and disclaimed all interest in the fund.

See Rec., pp. 17 and 18.

Pierre Poutz and Merchants' Mutual Insurance filed an answer, averring that the judgment relied on by Delmar was a nullity, the second district court of New Orleans, where it was rendered, having been, they pretended, without jurisdiction in the premises.

See Rec., p. 18.

Judgment by default was rendered against Dupasseur and Menard for want of answer.

See Rec., p. 17.

The Merchants' Mutual Insurance Company filed a further answer, alleging that the judgment obtained against Menard and Vignaud was of no validity, because the consideration of the obligation or claim of Delmar against Menard was Confederate currency, although no such plea was interposed by Menard; that the judgment was not *res judicata* against respondents, the Merchants' Mutual Insurance Company, who claimed the right to interpose the illegality of the original transaction in bar of Delmar's claim to be paid by preference; they prayed that Delmar's judgment should be declared void and of no effect.

See Rec., p. 18.

These issues were tried in the fifth district court of New Orleans, on the 9th May, 1868, when judgment was rendered against Henderson, Delmar and the others, and in favor of the Merchants' Mutual Insurance Company.

See Rec., pp. 58 and 59.

The main contest was between the Merchants' Mutual Insurance Company and John T. Delmar, the fifth district court arriving at its conclusion by treating the judgment rendered by the second district court in favor of Delmar as an absolute nullity, on the ground that the contract involved in the suit in which said judgment had been rendered was based on Confederate money.

When Delmar offered the record from the second district court, showing his judgment, the Merchants' Mutual Insurance Company offered to prove by oral testimony that the judgment was based upon a contract, the consideration of which was Confederate money; to which testimony

Delmar's counsel objected on the ground that the matter could not be inquired into collaterally in another court for the purpose of treating the judgment as a nullity, but the fifth district court overruled the objection, and Delmar's counsel took his bill of exceptions.

See Rec., p. 59.

The defendant, John T. Delmar, then appealed to the supreme court of Louisiana, where the judgment of the fifth district court, so far as he, Delmar, was concerned, was affirmed.

See Rec., pp. 63, 64 and 65.

Delmar applied for a rehearing, which was refused.

See Rec., pp. 65 to 68.

Delmar then sued out a writ of error to bring the case here, under the twenty-fifth section of the judiciary act of 1789.

See Rec., pp. 68 to 70.

POINTS.

First. By the practice in Louisiana, suits on appeal in the supreme court of that State are tried *de novo;* all the evidence, oral or documentary, administered on the trial in the court of the first instance goes up to the supreme court, which reviews and decides the whole case on the law and the facts, not being bound by the conclusions of the lower court or jury on either.

See Code of Practice, arts. 895, 896.

See Hennen's La. Digest, (1861,) vol. 1, p. 92, art. Appeal IX, (b,) § 3.

And when in possession of all the facts and testimony,

pronounces on the case the judgment which the lower court should have rendered.

See Code of Practice, art. 905.

Second. By the practice in Louisiana the supreme court is bound to state the reasons of its judgments by citing as exactly as possible the law on which it founds its opinions.

See Code of Practice, art. 909.

And within three days after that on which the judgment of the supreme court is rendered, a party dissatisfied may apply to the court for a rehearing, in a petition stating the reasons why he thinks the judgment erroneous, and citing the authorities in support of his opinion.

See Code of Practice, art. 912.

Hence the opinion of the court and the application for a rehearing form parts of the record, and as such will be looked to by this court to ascertain what laws were drawn in question.

See Almonaster *vs.* Kenton, 9 Howard, p. 9.

See Cousin *vs.* Blanc's Executor, 19 Howard, p. 207.

Third. The judgment of the supreme court of Louisiana sustained the validity of the article 127 of the constitution of the State, (see Rec., p. 65, line 6,) which was drawn in question as being repugnant to the § 1, section 10, Article I, of the Constitution of the United States.

Article 127, of the Louisiana constitution, says: "All agreements, the consideration of which was Confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this State."

The supreme court of Louisiana finding Delmar in possession of a judgment for debt and damages of so many dollars, allowed the Merchants' Insurance Company to go

behind the judgment and offer proof that the consideration of the contract on which the judgment had been based was Confederate money, (see Rec., p. 65, 4th line,) and, on that ground, declared the judgment and the contract null, destroying the obligation of both.

The present case is distinguishable from that of Bethel *vs.* Demaret, (10 Wallace, p. 537,) as the decision there appealed from did not appear to rest on the article of the constitution of Louisiana relied on by the lower court in the case before us.

Fourth. The original contract between Delmar and Menard was merged in the judgment of the second district court.

See Abat *vs.* Buisson, 9 La. Rep., (Curry, 1836,) p. 418.

See Woodworth *vs.* Spofford, 2 McLean, p. 168.

See Sedam *vs.* Williams, 4 McLean, p. 51.

Such a judgment could be sued upon in any other court of Louisiana, (see C. P., articles 732 and 746,) or in the courts of other States.

See Const. U. S., Art. IV, §1, act of 26th May, 1790, 1 U. S. Stat. at Large, p. 122.

This judgment imported a contract implied by law, and an agreement on the part of Menard to pay it, and that his property should be liable for its satisfaction.

See 3 Blackstone's Com., pp. *159 and 160.

Hence to invoke the consti ution of Louisiana in order to destroy the obligation is repugnant to the paragraph of the United States Constitution relied on.

Fifth. Delmar's suit against Menard in the second district court of New Orleans was instituted on the 13th April, 1864, (see Rec., p. 32,) and judgment signed on the 19th March, 1866.

See Rec., p. 48.

The second district court of New Orleans had by law jurisdiction of the case.

When instituted, 13th April, 1864, the court was acting under the laws of Louisiana, permitted by the military authority of the United States. These were the constitution of Louisiana of 1852, which gave to the legislature the power to organize courts inferior to the supreme court, (see Const. of 1852, title IV, art. 61;) and under the act of 28th April, 1853, passed in pursuance of it, and the 14th section thereof. All the courts in New Orleans have concurrent jurisdiction, except in certain cases specified, in which Delmar's is not embraced.

See Acts of 1853, p. 192.

After the institution of the suit, the jurisdiction of the second district court of New Orleans was modified by the act of March 25, 1865; but the seventeenth section, (see Acts, p. 86,) provided that these changes should not apply to the cases then pending or filed in the several district courts.

The judgment of the second district court of New Orleans, then, could not be re-examined except by the appellate jurisdiction of a court clothed with such power over it, and could not be impeached collaterally.

See Bryan *vs.* Atchison, 1 Louisiana Annual Reports, p. 462.

See Psyche *vs.* Paradol, 6 La. Rep., (Curry, 1834,) p. 366.

See Broussard *vs.* Bernard, 7 La. Rep., (Curry, 1834,) p. 223.

See Cocke *vs.* Halsey, 16 Peters, p. 71.

See Grignon *vs.* Astor, 2 Howard, p. 319.

Sixth. The action of the supreme court of Louisiana, confirming that of the fifth district court of New Orleans

setting the judgment of Delmar, deprived him of his property contrary to the law of Louisiana.

"A judgment, when once rendered, becomes the property of him in whose favor it has been given."

See La. Code of Practice, art. 548.

"No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, and in a manner previously prescribed by law."

See La. Civil Code, arts. 489, 466.

We see, then, that the judgment of the supreme court of Louisiana has deprived Delmar of his property contrary to law, and this is a violation of the Constitution of the United States amendments, Art. XIV: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Seventh. The instrument of mortgage offered in evidence by the Merchants' Insurance Company had been reinscribed in the mortgage office, but the evidence of reinscription did not bear a United States stamp.

The note, to secure which the mortgages had been given, was drawn in May, 1857, at one year, (see Rec., p. 28,) and on the 16th March, 1866, the following agreement was endorsed on it: "The payment of this note is, without novation, hereby extended to 1st December, 1866, for $5,000. (Signed,) P. Fourchy, Joseph Menard."

See Rec., p. 29.

Delmar's counsel contended that both the reinscription of the mortgage and the renewal of the note were required by the act of Congress to be stamped. The supreme court of Louisiana held that stamps were not required. (See Rec., p. 64.) Here, a right claimed under the laws of the United States and the decision is against the claim.

The renewal of the note is found on page 29 of the record; it is clear they are new agreements, and come under the schedule B of stamp duties, first article: "Agreements other than those specified in this schedule."

See 13 U. S. Stat. at Large, p. 298.

The same may be said of the reinscription of the mortgage.

A mortgage, to affect third persons, must be publicly inscribed on records kept for that purpose.

See La. Civil Code, art. 3314.

This preserves the mortgage during ten years; the effect ceases, even against the contracting parties, if the inscriptions have not been *renewed* before the expirations of their time, in the manner in which they were first made.

L. C. C., art. 3333.

Nothing could come more completely within the meaning of the stamp act than such a reinscription; it is a *renewal* of the mortgage, and that is precisely the case provided for in schedule B, act of 30th June, 1864, article Mortgage in the Proviso.

See 13 U. S. Stat. at Large, p. 300.

The court erred, therefore, in admitting these instruments in evidence without stamps.

It is respectfully submitted, then, that the motion to dismiss the writ of error should not prevail, and that the judgment of the supreme court of Louisiana should be reversed.

THOMAS J. DURANT,
for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 443.

JOHN D. DELMAS

vs.

THE MERCHANTS' MUTUAL INSURANCE CO.

MOTION TO DISMISS THE WRIT OF ERROR.

And now comes the Merchants' Mutual Insurance Company and moves the court to dismiss the writ of error in this case upon the ground that the record in said case presents no question of which this court can acquire jurisdiction.

The court below decided no question as to the validity of any treaty or statute, or adverse to any authority exercised under the United States.

It decided no question as to the validity of any statute, or any authority exercised under any State, repugnant to the laws and authority of the United States, and in favor of such State law and authority.

It did not decide any question wherein the construction of the Constitution of the United States or any treaty, statute, or commission of the same, was drawn in question, nor did it decide adversely to any claim, right, title, privilege, or exemption set up under the same.

Whereof the defendant prays judgment, and that said writ of error be dismissed.

A. G. RIDDLE,
Counsel for Defendant.

Supreme Court of the United States.

DECEMBER TERM, 1870.

No. 443.

J. T. DELMAS

vs.

THE MERCHANTS MUTUAL INS. COMPANY.

Error to the Supreme Court, Louisiana. On motion to dismiss the writ of error.

BRIEF OF APPELLEE.

It appears that the issue was to determine which of the above parties (both defendants in the suit below) was entitled to a certain fund then in the hands of the plaintiff below, the proceeds of a judicial sale of real estate purchased by plaintiff.

The appellant claimed under a judicial seizure by garnishment, to satisfy a judgment, against the former owner.

The appellee, under seizure to satisfy a mortgage of the property, out of the sale of which the fund arose.

In the opinion of the court, the appellant had the prior claim; but it held that the consideration of his demand was a payment in confederate money, and his judgment void, and gave judgment for the appellee.

I.

The appellant claims that the court so held pursuant to the 127th article of the Louisiana constitution, which article he says impairs the validity of a contract, in violation of the 10th

section, article I, of the United States Constitution, and hence the resulting jurisdiction of this Court.

The facts and holdings appear in the opinion of the court; Rec., p. 63. The 127th article of the Louisiana constitution, is on p. 69.

It is submitted in support of the motion, that the court held the contract on which the appellant sued void, not in consequence of said 127th article, but upon general principles recognized and enforced by the courts of Louisiana anterior to the article in question, (see Rec., pp. 69, 70;) and, therefore, this court has no jurisdiction on that ground.

Crowell vs. *Randell*, 10 Peters, 368; 12 Curt., 164.

The Ocean Insurance Company vs. *Polleys*, 13 Peters, 157; 13 Curt., 104.

Lessee of Coons vs. *Gallagher*, 15th Peters, 18; 14 Curt., 18.

Numerous cases exist where this court has decided that when it can be reasonably shown that the court below decided upon grounds other than against a right claimed under the Constitution, or a statute or treaty of the United States, it shall be presumed that the court did decide upon such other grounds. That whenever the court could have decided upon ground not covered by the twenty-fifth section of the judiciary act, it shall be presumed that it did.

II.

The note and claim of the appellee were dated in 1857, and the mortgage was *reinscribed* in 1867.

The note was without stamp. It was not made to appear whether a stamp was used upon the reinscription of the mortgage.

It was contended by the appellant at the trial that the note upon which the appellee claimed was void for want of a stamp; and hence the judgment violated a right claimed under a law of the United States. This is not made by him in his pleading. (Rec., p. 12.)

1st. It is difficult to see how he could raise this question. If his own debt was valid then he appropriates and exhausts the fund—if not, how can it concern him whether the appellee's claim be valid or not?

2d. How can it be said that the court below decided adversely to a right claimed under a statute of the United States? There was no statute in existence requiring a stamp to be placed

upon the note in question. (See 2d Bright's Dig., Inter. Rev., p. 286. Stamp duties, p. 371 and p. 377, &c.)

It is true the appellant on the trial said that he made such a question, and claimed a right under the internal revenue statutes, and the court rules that he did; but how could he when no alleged fact exists, out of which, under the statutes, such a right or claim or question could grow?

It is submitted that the writ of error in this case must be dismissed for want of jurisdiction.

Respectfully submitted,

A. G. RIDDLE,
For Motion.

Supreme Court of the United States.

DECEMBER TERM, 1871.

J. T. DELMAS
vs.
THE MERCHANTS' MUTUAL INSURANCE COMPANY } No. 227.

Error to the Supreme Court of Louisiana.

DEFENDANT'S BRIEF.

Statement.

Joseph Menard was a debtor, owing various debts, evidenced by notes, mortgages, and judgments.

Certain real estate was sold by sheriff on execution, and purchased by Henderson for $5,625, who paid the execution and costs, and held in his hands, applicable to Menard's other debts, the sum of $3,499 07.

Various of these creditors brought suits against Henderson to appropriate this fund, when he by suit compelled them to interplead, and they answered. The contest, however, narrowed, and finally rested between the parties now before the court.

Delmas claimed the fund by virtue of a seizure on *fi. fa.* in Henderson's hands.

The Merchants' Mutual Insurance Company, by virtue of a prior mortgage of the land sold, made to secure a note of $5,000.

Delmas claims priority of the Insurance Company because the note and mortgage, dated May 28, 1857, were barred by statute—the note in five and the mortgage in ten years, which periods had elapsed.

The insurance company impeached the judgment of Delmas on the ground that the consideration for the agree-

ment, to enforce which the judgment was rendered, was Confederate money.

On these issues the Supreme Court held, on grounds not apparent, that Delmas' judgment could be assailed, and then, very properly, that it was void, for the reason alleged.

After the removal of this obstacle it necessarily adjudged the fund to the insurance company.

To reverse this judgment, Delmas brings the case to this court under the 25th section of the Louisiana act.

I.

a. If the court erred in reopening this judgment he has no remedy here under that section.

It is claimed that after the court opened the judgment it erred in deciding that Delmas' cause of action was illegal, as impairing the validity of a contract, under the 127th article of the Louisiana constitution, which violates the 10th section, article 1, of the United States constitution.

The court below so ruled on general principles, and not by virtue of the 127th article of the Louisiana constitution.

Rec., pp. 69, 70.
Bethel *vs.* Demaret, 10 Wal., 537.
Crowell *vs.* Randell, 10 Peters, 368.
Ins. Co. *vs.* Polleys, 15 *id.*, 18

It would seem that this must dispose of the case. Delmas can only ask this court to review so much of the judgment of the court below as is adverse to him. In this the court finds no question under the 25th section, and must sustain the motion to dismiss.

b. If the court should review that part of the judgment of the court below which decided that Confederate money was not a good consideration, it would find no error in it, and hence must sustain the judgment below.

If the court below committed no error against the plaintiff, how can he raise a question as to the claim of the defendant?

If there is error in that part it cannot enure to his benefit. The fund could never come to him.

The questions sought to be raised under the fourth and sixth subdivisions of the plaintiff's brief were not raised in the court below, and are not well taken.

II.

Did the court below err in receiving unstamped paper, conceding that such a question is open?

It is not quite apparent from the record what were the questions made and insisted on below.

Henderson, in his petition, denies that the note was stamped, and says that no stamp accompanied the reinscription of the mortgage.

Rec., p. 3.

Delmas, in his answer, insists that the note and mortgage were void by the prescription, and makes no objection for want of stamps.

Rec., p. 10.

In his petition for a rehearing he makes no point as to stamps; and in his petition in error he says "an instrument of evidence" was offered without a stamp.

Rec., p 69.

The court merely says the note required no stamp, nor did its extension, while there was no proof whether the reinscription of the mortgage was stamped or not.

Rec., p. 65.

a. Clearly, the note itself need not be stamped; extending the time not a novation.

Arts. 2181–83, La. Code, 295.

Such an act or thing never required a stamp; it need not be in writing at all.

Is not covered by schedule B.

13 Stats., 298.

b. The reinscription of the mortgage was not an agreement under the schedule cited above, nor is it contemplated by that.

See Mortgages, p. 300, 13th Stats.

As the court directed my motion to dismiss to be heard with the case on its merits, I refer to my brief in support of that motion.

Respectfully,

A. G. RIDDLE, *for Defendant.*

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